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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

IN RE: THE INQUIRY OF EVAN W. BROADBELT, J.M.C.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF NEW JERSEY

PETITION FOR WRIT OF CERTIORARI

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35 pp

QUESTIONS PRESENTED

1. Does the New Jersey Supreme Court's prohibition on Petitioner's continued guest appearances on television shows impermissibly infringe upon his First Amendment rights?

2. Does the published opinion of the New Jersey Supreme Court (In Re: The Inquiry of Evan W. Broadbelt, J.M.C., 146 N.J. 501 (1996), holding that petitioner "violated Canons 2B and 3A(8) of the Code of Judicial Conduct, where he was never charged with any wrongdoing, never had a hearing, and merely petitioned for review of an advisory opinion, violate petitioner's rights under the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

LIST OF PARTIES

Petitioner:

Evan W. Broadbelt, J.M.C.

Respondent:

New Jersey Supreme Court Advisory
Committee on Extrajudicial Activities

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NO.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

IN RE: THE INQUIRY OF EVAN W. BROADBELT, J.M.C.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

The Petitioner, Evan W. Broadbelt, J.M.C., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of New Jersey entered in the above-entitled proceeding on October 10, 1996.

OPINIONS BELOW

1. The letter directive of Assignment Judge Lawrence M. Lawson "vitiating" his prior approval of the petitioner's appearance on the Geraldo T.V. show as violative of Canon 2B of the Code of Judicial Conduct and Guideline IV-A(1)(b)(1)(2) promulgated by the New Jersey Supreme Court's Advisory Committee on Extrajudicial Activities. It is reprinted in the Appendix at page 37a, infra.

2. A letter dated April 18, 1995 from the Advisory Committee on Extrajudicial Activities

reflecting the Committee's disapproval of television appearances. The opinion is reprinted in the Appendix at page 36a, infra.

3. Advisory letter of the Committee on extrajudicial activities dated June 23, 1995 (Opinion 13-95) which ratified its previous vote of disapproval and expressing the view that TV appearances would not be appropriate under the relevant portion of Canon 2 - "a Judge should not lend the prestige of office to advance the private interest of others" and Guideline IV C-1. The opinion is reprinted in the Appendix at page 34a, infra.

4. The Opinion of the Supreme Court of New Jersey dated October 10, 1996, In Re: The Inquiry of Evan W. Broadbelt, J.M.C., 145 N.J. 501 (1996) ruling that the conduct of the petitioner was violative not only of Canon 2B of the Code of Judicial Ethics but also Canon 3A(8) and further that the proscriptions imposed by the New Jersey Supreme Court were constitutional as applied to the petitioner. It is reprinted in the Appendix at page 1a, infra.

JURISDICTION

On October 10, 1996, the Supreme Court of the State of New Jersey rendered an opinion holding

that petitioner violated Canons 2B and 3A(8) of the Code of Judicial Conduct and ruling that the proscriptions placed upon petitioner's speech did not violate the First Amendment. The jurisdiction of this Court is invoked pursuant to 28 U.S.C.A. §1257.

CONSTITUTIONAL PROVISION AND JUDICIAL CODES INVOLVED

Involved in the within petition are the First Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and Canons 2,3 and 4 of the Code of Judicial Conduct made part of the Rules Governing the Courts of the State of New Jersey. (Appendix at p. 57a-62a).

STATEMENT OF THE CASE

This matter involves the right of a Judge to appear on television, without compensation, giving comments which are designed to be instructive and educational for lay audiences. The New Jersey Supreme Court found that the conduct was violative of two Canons of the Code of Judicial Conduct and that its restrictions on the speech of a Judicial Officer was not violative of the First Amendment.

CHRONOLOGY AND STATEMENT OF FACTS

Petitioner has been a Municipal Court Judge since 1982 and presently serves as a Municipal Court[1] Judge in four municipalities in Monmouth County and one in Ocean County, New Jersey. He has served as an Assistant County Prosecutor, a Municipal Prosecutor in two municipalities, Secretary of a District Ethics Committee for 10 years, and for the past six years has been a member of the Supreme Court Committee on Municipal Courts. He serves as an elected member of the Board of Governors of the American Judges Association.

Since September, 1992, he has appeared as a guest, without compensation (approximately fifty times), on Court TV, providing commentary on criminal trials in various jurisdictions. Illustrative examples were provided to the New Jersey Supreme Court in the Amicus Curiae Brief and Appendix submitted by Courtroom Television Network. The excerpts are reprinted in the Appendix at p. 103a-127a.

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[1]In New Jersey, Municipal Courts are courts of limited territorial and subject matter jurisdiction. Such jurisdiction includes municipal ordinance, motor vehicle and disorderly person offenses, and certain limited criminal offenses. N.J.S.A. 2B:12-16 et seq.

Between November 1994 and February, 1995, petitioner appeared on the "Rivera Live" program on three occasions, again in accordance with the provisions of Canon 4, to provide commentary on the matter of People of California v. Simpson. Those appearances, also, were without compensation. Petitioner has never made aware of any complaint or criticism of comments made during any of his appearances.

On December 8, 1994, petitioner appeared on a local cable television program, "Legal Line", hosted by Robert Abrams, Esq. of the Monmouth County Bar, to discuss the jurisdiction and procedures of the municipal courts, generally. The next day, petitioner was contacted by the Honorable Lawrence M. Lawson, A.J.S.C.[1] and advised that prior approval was required before he could make any further television appearances. The matter was discussed, and thereafter Judge Lawson issued a memorandum indicating that prior approval was not mandated, but that petitioner should give him notification of future appearances.

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[1] A.J.S.C. represents "Assignment Judge Superior Court". Assignment judges are the judges responsible for the administration of all courts within their given counties or venues.

Petitioner complied with that memorandum. It is reprinted in the Appendix at page 54a, infra.

On March 20, 1995, petitioner received a letter from Judge Lawson, who stated that he had to "vitiate" his prior approval and requested that petitioner refrain from appearing on any television programs. [It is reprinted in the Appendix at page 37a, infra.]

By letter dated March 20, 1995, petitioner advised Judge Lawson that he disagreed with the change in position and on that same date Judge Lawson referred the matter to the Advisory Committee on Extrajudicial Activities for review. It is reprinted in the Appendix at page 40a, infra.

On March 31, 1995, petitioner filed an inquiry for the Committee's consideration and by letter dated April 18, 1995 was advised by the Committee's secretary that the Committee had held a telephone conference and disapproved of commercial broadcast appearances. Petitioner was further notified that an Advisory Opinion would be issued after the next formal Committee meeting. On June 23, 1995, the Committee issued Opinion #13-95. That Opinion essentially ratified the previous vote of

disapproval of television appearances opining "that the Committee was of the view that such appearances would not be appropriate under the relevant portion of Canon 2 (a Judge should not lend the prestige of office to advance the private interest of others and Guideline IV.C. 1". It is reprinted in the Appendix at page 34a, infra.

Petitioner sought review of this Committee Opinion by Petition for Review to the Supreme Court of the State of New Jersey. In his Letter Brief in support of the Petition for Review, Petitioner raised the constitutional issue that the proposed prohibitions infringed upon his First Amendment rights. The Letter Brief is reprinted in the Appendix at page 83a, infra. (See more specifically pages 85a - 86a and 100a - 102a).

The New Jersey Supreme Court granted the petition and eventually published an opinion which held that Petitioner had violated Canons 3A(8) and 2B of the code of Judicial Conduct and that the restrictions placed upon the Petitioner did not violate his First Amendment rights.

Petitioner did not raise any Due Process issues, since his rights to Due Process were not

involved until the Supreme Court of the State of New Jersey first published the opinion finding "ethical violations" and for which certiorari is now sought.

REASONS FOR GRANTING THE WRIT

THE NEW JERSEY SUPREME COURT'S PROHIBITION ON PETITIONER'S PROPOSED TELEVISION APPEARANCES VIOLATES THE FIRST AMENDMENT IN THAT THE COURT HAS PROVIDED NO BASIS FOR THE ASSERTION THAT PETITIONER'S CONDUCT COMPROMISED THE INTEGRITY OF THE JUDICIARY, AND THE COURT'S PROHIBITION IS CONSIDERABLY MORE RESTRICTIVE THAN NECESSARY TO ACHIEVE ITS STATED OBJECTIVES.

In this matter, Petitioner asked the New Jersey Supreme Court whether his continued appearance on various televised commentary shows was violative of Canon 2B in that a Judge should not lend the prestige of office to advance the private interest of others. Notwithstanding that narrow presentation the New Jersey Supreme Court broadly concluded that not only was Canon 2B violated but Canon 3A(8) was similarly violated, noting, however, that the issues presented by the appeal had not been previously addressed and that adequate guidance concerning judge's appearances on television were not previously available. In Re: The Inquiry of Evan W. Broadbelt, J.M.C., 146 N.J. 501 (1996) reprinted in the Appendix pp. 1a-32a at 4a.

It should be stressed at the outset that the New Jersey Supreme Court found that the Petitioner was "a well-respected Municipal Judge" who had been appearing on television as a guest commentator since 1992 without compensation. The Court expressed that it had no doubt the Petitioner's commentary was informative and educational. (Id. at 25a). Again, a review of the transcript excerpts (provided in the Appendix at pages 103a-127a) are illustrative of the commentaries. The record is void of any complaints about the Petitioner's activities or commentary that led to the proscription of further appearances.

The New Jersey Court acknowledged that its experience was "evolving" and that it "need not now attempt to proscribe precise limits for judicial appearances on television programs." (Id. at 23a). Notwithstanding these stated sentiments, and based upon the limited record before it, the Court gave a blanket prohibition to the Petitioner from making any further television appearances. The Justices strangely held that not every appearance by a Judge on commercial television would be improper or would create the appearance of impropriety, but that a regular appearance on television, whether the program

was commercial or non-commercial on Court decisions in New Jersey, "would clearly be improper." The Court stated that because of Judge Broadbelt's frequent appearances he had become identified with the program and thereby lended the prestige of his judicial office to the broadcast. There is simply no record support for this gratuitous observation. The court did not provide any meaningful definitional distinction between "occasional" or "regular" appearances.

Before reaching its constitutional pronouncement, the New Jersey Supreme Court went beyond the issue presented to it in the Opinion by the Advisory Committee on Extrajudicial Activities, i.e. that the continued appearances would be violative of Canon 2 in that Judge Broadbelt would be lending the prestige of his office to a commercial interest. It added (again, after noticing that the issues had not been previously addressed nor that adequate guidelines had been made available) that Judge Broadbelt "violated" Canon 3A(8) and that Canon 3 provided that a Judge "should perform the duties of judicial office impartially and diligently." There is no question or suggestion that Judge Broadbelt has ever performed the duties of his judicial offices other than impartially

or diligently. Indeed, the Court early noted that Petitioner was and is a well-respected Municipal Court Judge.

Yet, the New Jersey Supreme Court found that Petitioner's conduct "violated" Canon 3A(8). The Court cited a variety of authorities to support this conclusion, yet these authorities are not persuasive when weighed against this record.

Canon 3A(8) prohibits public comment regarding cases pending in any court and the court cites for support of that proposition In Re: Hey, 425 S.E. 2d, 221 (West Virginia 1992). In In Re: Hey, the West Virginia Judicial Hearing Board found, after a hearing, that the respondent there violated Canon 3A(6) of its Judicial Code and recommended that the Judge be publicly censured based upon a complaint wherein the respondent appeared on a nationwide television program and discussed specific facts and issues of a case which was pending before the West Virginia Supreme Court pursuant to a petition to prohibit enforcement of an Order entered by the respondent. During the television program, apparently, the Judge made negative comments in a child custody case regarding the child's educational

performance, church attendance and cast aspersion upon the mother's fitness and character as a custodial parent.

In Re: Hey was a matter clearly different from that presented by this record where we deal with instructional and educational commentary on pending cases. Again, a review of the transcripts of Judge Broadbelt's commentary does not bespeak anything which may be termed hysterical, disparaging, unprofessional or opinionated.

The New Jersey Supreme Court in its Opinion correctly noted that Canon 3A(8) does not prohibit a Judge from making statements in the course of his judicial duties or comments concerning court procedures nor is the Judge forbidden from commenting on a case that is no longer pending. Significantly, the New Jersey Supreme Court pointed to United States v. Garwood, 16 M.J. 863,868 (A.C.M.R. 1983) aff'd, 20 M.J. 148 (C.M.A.), cert. denied, 474 U.S. 1005, S. Ct. 524, 88 L. Ed. 2d 456 (1985), in which a Judge expressed his opinion about tactical decisions by defense counsel, the relevance of certain discovery items and his opinion as to whether defendant should take the stand in a pending case. This conduct was

deemed inexcusable. But, more importantly, that no matter what the Judge's motivation, his stated views crossed the line between permissible and impermissible commentary. Again, we urge that the commentary here under review is not suggested by anyone to be of that impermissible nature. No line was crossed in this case.

The Court cited In Re: Benoit, 523 A. 2d, 1381 (Maine 1987) wherein it was found inappropriate for a Judge following the remand of a case to write to a local newspaper defending his sentences. Again, the Benoit conduct here totally differs from the instant record.

So too, in Ryan v. The Commission on Judicial Performance, 754 P. 2d. 724 (California 1988), it was found that there were three separate instances of violations of Canon 3A(8); (1) that the Judge discussed a draft opinion with the press before notifying the parties of his ruling; (2) the Judge made statements to the press concerning a pending contempt order; and (3) the Judge discussed another pending matter with the press and wrote a letter to a newspaper explaining his sentence in a specific case. It was held that this kind of conduct violated the

Canon against commenting on pending cases. Again, a far, far cry from that which we have in the instant matter. Thus, Hey, contrary to the position the New Jersey Supreme Court cites it for, does not stand for a rule proscribing comment on every case in every court in the United States.

In the instant matter the Petitioner did not discuss or give opinions on the merits or worth of a pending case but rather discussed in broad and general terms instructional facets of the trial of a matter. Petitioner readily accepts that the purpose of the Canon involved is to protect the integrity of the judiciary but urges that there is no showing of any impact or threat of impact on the integrity of the judiciary by his television appearances over the last five years. Indeed, on this point the Court was compelled to direct its Advisory Committee to modify a Guideline to conform with the Canon, which Guideline III.A.5, seemed to provide that the prohibition against commenting on cases was limited to those pending in New Jersey Courts.

Separately, the New Jersey Supreme Court found that Judge Broadbelt's conduct "violated Canon 2B". Canon 2 provides that a Judge should avoid

impropriety and the appearance of impropriety in all activities and 2B proscribes a Judge from lending the prestige of office to advance the private interest of others.

Again, the authorities employed by the Court in finding a "violation" of this Canon simply do not fit the bill when weighed against the record.

In Re: Santini, 126 N.J. 291 (1991) found a violation wherein a Judge telephoned another Judge concerning a client's arrest and noted that a Judge may not use his judicial office to advance the private interest of others nor convey or permit others to convey the impression that he is in a special position to exert influence. It is hard to square the Santini thinking with the Petitioner's commentaries which the Court has specifically found to be "informative and educational."

In Re: Murray, 92 N.J. 567 (1983), found a code violation wherein a Municipal Court Judge wrote to another Municipal Court Judge seeking preferential treatment for a private and personal client.

Also, clearly different is, In Re: Anastasi, 76 N.J. 510 (1978) holding that a Judge should not be a voluntary character witness for a

friend applying for a State issued license because that would lend the prestige of the Judicial Office to advance the private interest of another.

The Court relied on In Re: Blackman 124 N.J. 547, 554 (1991), and found that a Judge's attendance at a picnic hosted by a convicted felon violated the Canon and that his appearance might be held to have been supportive of the host and might create the appearance of impropriety. In all of the above cited cases employed by the Court to support its finding of a "violation", we clearly had judicial behavior that "crossed the line" between the permissible and the impermissible.

Petitioner recognizes and reasserts his acceptance that Canon 2B is to protect the independence and the integrity of the Judiciary. He cannot accept, however, the Court's answer to what it terms a more difficult question, whether a Judge lends the prestige of his office to a television program merely by appearing on it. The New Jersey Supreme Court has said in this matter that a Judge should avoid appearing on television programs when the Judge's association with the program compromises the independence and the integrity of the Judiciary and it

cites as factors in this determination the frequency of appearances, intended audiences, subject matter, and whether or not the program is commercial. Having stated that question and having stated that it is difficult to answer, it does not fairly point to any record support for Judge Broadbelt's conduct which compromises the independence and integrity of the Judiciary or any potentiality for such an impact. Indeed, the court's sole basis for the ban here was the purported frequency of the appearances. There was no mention of the other factors.

The New Jersey Supreme Court, having said the above, and before addressing its constitutional concerns, notes that its experience is "evolving", that it need not now attempt to "proscribe precise limits for judicial appearances on television programs." It notes only that exceptional caution and discretion are essential and the Court anticipated that the Advisory Committee on Extrajudicial Activities will perform a vital role in formulating standards to govern all such appearances in the future. (Id. at 22a). Notwithstanding that, it nonetheless found the Petitioner's conduct on the record here, "violative" of two Ethical Canons. It

then rather glibbly pointed out that Canon 4 was not operative because of the "violations" of the other cited Canons.

Canon 4 essentially states that a Judge may engage in activities to improve the law, the legal system and the administration of justice including speaking, writing, lecturing and participating in activities concerning the law, the legal system and the administration of justice. (Appendix at p. 61a). Petitioner respectfully submits that on this point the argument that Canon 4 is obviated by the alleged violations of Canons 2 and 3 are bootstrapped. Significantly, in January of 1995, the New Jersey Supreme Court approved an amendment to Guideline III.A.1. of the Guidelines for Extrajudicial Activities, which changed the language from a judge "may speak" to "judges are encouraged to accept invitations to speak." (Emphasis supplied).

We turn now to the New Jersey Supreme Court's treatment of the constitutional question on whether the placement of restrictions on a Judge's speech violates the First Amendment of the United States Constitution. The New Jersey Supreme Court, citing cases, begins by noting that a Judge does not

relinquish his or her First Amendment rights on ascending the bench but that limitations may be placed on a Judge's First Amendment right. The Court observed that in analyzing a Judge's right to speak freely, three different tests have been employed: (a) the Pickering public employee balancing test; (b) the strict scrutiny test; and (c) the hybrid Pickering/strict scrutiny test.

The New Jersey Supreme Court, however, chooses to apply the so called "Gentile middle-tier" scrutiny standard which it denotes the "Gentile-Hinds" standard.

The New Jersey Supreme Court noted that it applied a middle-tier scrutiny test in cases involving the regulations of an attorney's speech about pending cases, In Re: Hinds, 90 N.J., 604 (1982). The Court noted that in Hinds they found that a disciplinary rule forbidding an attorney from commenting on a pending case did not violate the First Amendment and further observed that when presented with a similar issue, the United States Supreme Court adopted the Hinds middle-tier scrutiny test and concluded that a State may regulate an attorney's speech if it creates a substantial likelihood of materially prejudicing an

adjudicatory proceeding. Gentile v. State Bar of Nevada, 501 U.S. 1030, 111 S. Ct. 2720, 2745, 115 L. Ed. 2d. 923-24 (1991). (Emphasis supplied).

The Disciplinary Review Rule involved in Hinds essentially provided that during the trial of a criminal matter a lawyer, with either the prosecution or defense, should not make or participate in making an extrajudicial statement which he expects to be disseminated by means of public communication, that relates to the trial or issues in the trial that are reasonably likely to interfere with a fair trial.

In Gentile, the majority of the United States Supreme Court reversed a finding of the Nevada Disciplinary Board against an attorney who had made pretrial statements regarding an indictment of his client. In speaking for the majority, Justice Kennedy stated that "it would be difficult to single out any aspect of government of higher concern and importance to the people in the manner in which criminal trials are conducted." Gentile, supra. at 898 (citing Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575, 65 L.Ed. 2d 973, 100 S. Ct. 284 (1980)). The Court then referred to In Re: Hinds, 90 N.J. 604 (1982), noting that "substantial likelihood of

material prejudice" standard is a linguistic equivalent of "clear and present danger." In reversing the finding by the Nevada Supreme Court that there was a disciplinary breach, the United States Supreme Court stated that neither the Disciplinary Board nor the Reviewing Court explained in any sense in which the Petitioner's statements had a substantial likelihood of causing material prejudice. So, in the instant case, there is no showing or suggestion by the Court or reference to any thing in the record that the appearances by the Petitioner Broadbelt and his commentaries on trials pending or otherwise, contained or had within them a substantial likelihood of causing any material prejudice to either the case, or the integrity of the judiciary.

Again, in reviewing the material supplied to the New Jersey Supreme Court as illustrative of the kinds of commentary the Petitioner Broadbelt was engaging in, the New Jersey Court cited nothing that impaired or had the potential to impair any ongoing trial, be it in New Jersey or otherwise. Petitioner discussed such things as: the definitions of criminal elements as contained in a Court's instruction (Appendix p.103a-105a); how trial records are made and

preserved (Id.); the manner in which expert witnesses testify regarding mental capacity (Appendix p.106a-107a); the effect and manner of cross-examination (Id.); the elements of different murder counts (Appendix p. 108a-109a); how offenses in Municipal or Local Courts may be prosecuted (Appendix p.110a); prosecutor's obligation to present exculpatory as well as incriminatory evidence (Appendix p.111a-113a); the reason for making trial objections (Appendix p.114a-117a); change of venue in criminal matters (Appendix p. 118a); rules governing attorney-client privilege (Appendix p.119a-120a); the use of two juries in a single trial (Appendix p.121a-122a); matters of cross-examination (Appendix p.122a-123a); the use of prior criminal convictions for purposes of affecting credibility (Appendix p.123a-124a); the use of aggravating and mitigating circumstances in sentencing procedures (Appendix p.124a-127a).

A review of this record reflects nothing in the conduct of this Judge in the exercise of his free speech which impaired or had the potential or tendency to impair the judicial process. The Court, in making its sweeping denial of the Judge's right to exercise his free speech (while, at the same time,

acknowledging he had it) simply disregarded and made no reference whatever to the substance of any of the speech he was employing.

If there in fact be a "Gentile/Hinds" standard in testing a Judge's right of free speech, there is absolutely no suggestion or record reference that the Petitioner here had violated that standard (or any other). Again, as Gentile itself says, it is important that the people know the manner in which criminal trials are conducted and that before speech regarding the conduct of trial be proscribed, there must be a showing of substantial likelihood of material prejudice to the Judicial Process from the speech and that on a level of a "clear and present danger" to the good order of the Courts. (Emphasis supplied).

The New Jersey Supreme Court makes no record reference to any reason for the abrupt, unexplained and unwarranted "vitiation" of Judge Broadbelt's commentaries.

No line was drawn. No line was crossed.

We say again, as the New Jersey Supreme Court said, that we deal here with a well-respected Judge whose commentary was informative and educational

and that while the New Jersey Court's experience was "evolving" they would not attempt to prescribe precise limits for judicial appearances on T.V. programs. Notwithstanding all of that, the New Jersey Supreme Court's quick answer to Judge Broadbelt was, "you may not speak at all."

THE NEW JERSEY SUPREME COURT'S PUBLISHED OPINION (IN RE: THE INQUIRY OF EVAN W. BROADBELT, J.M.C. 146 N.J. 502 (1996)), AMOUNTS TO A PUBLIC REPRIMAND IN VIOLATION OF THE DUE PROCESS CLAUSE AND THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.

Jurisdiction of this matter was conferred on the New Jersey Supreme Court under the provisions of Rule 1:18A-7. (Appendix p.55a-57a). Petitioner sought advice from the Advisory Committee on Extrajudicial Activities, a body appointed by and serving at the pleasure of the New Jersey Supreme Court.

Rule 1:18A contains no procedure for a petitioner to request or receive a hearing on the inquiry. In this case, no such hearing was offered or held. The Committee issued two letter opinions, dated April 18, 1995 (Appendix p.36a) and June 23, 1995 (Appendix p.34a). There was a telephone polling of the members of the committee, followed by a meeting of

the committee on June 16, 1995. Petitioner was not given the opportunity to appear or participate on either occasion. The committee found no wrongdoing.

The New Jersey Supreme Court, in the context of petitioner's request for advice, rendered and published an opinion determining that petitioner had violated Canons 2B and 3A(8) of the Code of Judicial Conduct.

Although the advisory committee issued its opinion based upon Canon 2, the New Jersey Supreme Court, rather than give petitioner the advice for future conduct which was requested, issued an opinion on petitioner's past conduct, holding:

"We conclude that Judge Broadbelt should not have commented on pending cases from any jurisdiction. Moreover, we are persuaded that Judge Broadbelt's commentary on pending cases on 'Court TV' and 'Geraldo Live' (sic) was inappropriate and had the potential to compromise the integrity of the judiciary in New Jersey'" 146 N.J. In Re: Broadbelt, supra. at 511 (Emphasis supplied) (Appendix at p. 15a).

As to petitioner's request for advice under Canon 2B, the Court similarly ignored the request for advice and instead issued an opinion upon past conduct. "We also

determine whether Judge Broadbelt's conduct violated Canon 2B." (Id. at 512).

"In the instant case, Judge Broadbelt's regular appearances on commercial television violated Canon 2B." (Id. at 515) (Emphasis Supplied) (Appendix at p. 22a).

Further, the Court's response to petitioner's submission of the provisions of Canon 4 were met with a similar adjudicatory, not advisory, response.

> "Canon 4 does not excuse the violations of other canons. . . . "Although Petitioner's conduct may have included teaching about the law, the legal system, and the administration of justice, that conduct is not permitted if it violates another canon. Accordingly, because Petitioner's conduct violated Canons 3A(8) and 2(B), Canon 4 does not excuse it."

Id. at p.517 (Emphasis Supplied)(Appendix at p. 24a-25a).

New Jersey Rule of Court Rule 2:15 (Appendix p. 73a-82a) establishes the Advisory Committee on Judicial Conduct. That Rule applies to all judges in the State of New Jersey, and provides procedures for the discipline and/or removal of judges

from office. That Rule contains the essential elements of procedural due process, including the notice to a judge of a complaint (R.2:15-10b), the opportunity for an informal conference (R.2:15-11(c)), and, if formal proceedings are recommended, the opportunity for a hearing (R.2:15-3).

In this matter, the petitioner appeared on commercial television with the express consent of his Assignment Judge. Upon receiving written notification from the Assignment Judge to refrain from further appearances, petitioner complied with the request and proceeded with this matter under Rule 1:18A, with the precise aim of seeking guidance on future conduct, rather than becoming a respondent charged with a violation of the Code of Judicial Conduct under Rule 2:15.

The Federal question sought to be reviewed herein is whether the decision of the New Jersey Supreme Court, which clearly is a public admonition of the petitioner, has been rendered in violation of the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.

The Federal question is being raised in this writ for the first time, since petitioner

reasonably anticipated that the New Jersey Supreme Court would issue an opinion giving advice to petitioner as to future conduct, as contemplated by Rule 1:18A. Instead, the Court made findings based upon the prior conduct of Petitioner, conduct approved in advance by the Assignment Judge, without giving petitioner even the slightest semblance of due process.

This Court has consistently held that "[T]he touchstone of due process is protection of the individual against arbitrary action of government. Wolf v. McDonnell, 418 U.S. 539 (1974), 41 L.Ed.2d 935, 94 S.Ct. 2963. In Wolf, this Court reiterated that there is no question that prisoners have First Amendment and Fourteenth Amendment rights (citing Cruz v. Beto 405 U.S. 319 (1972) and Cooper v. Pate, 378 U.S. 546(1964).

More importantly, "[T]he Court has consistently held that some kind of hearing is required at some time before a person is finally deprived of his property interests." Wolf, supra. at 557. Further, "We think a person's liberty is equally protected, even when the liberty itself is a statutory creation of the state." (Id. at 558).

Thus, in reaching to silence petitioner, the New Jersey Supreme Court held him out to the world to be the violator of the Code of Judicial Conduct without notice, hearing or reason.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant the Writ of Certiorari.

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On the Brief

DATED: January 7 , 1997

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

IN RE: THE INQUIRY OF EVAN W. BROADBELT J.M.C.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF NEW JERSEY
APPENDIX

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SUPREME COURT OF NEW JERSEY
A-71 September Term 1995

IN RE: THE INQUIRY OF EVAN W.

BROADBELT, J.M.C.

Argued January 17, 1996 -- Decided October 10, 1996

On review of an opinion of the Advisory Committee on Extrajudicial Activities.

Francis X. Crahay argued the cause for appellant, Evan W. Broadbelt, J.M.C. (Tompkins, McGuire & Wachenfeld, attorneys; Evan W. Broadbelt, J.M.C., pro se, on the briefs).

Michael J. Haas, Senior Deputy Attorney General, argued the cause for respondent, Advisory Committee on Extrajudicial Activities (Deborah T. Poritz, Attorney General of New Jersey, attorney; Joseph L. Yannotti, Assistant Attorney General, of counsel).

Floyd Abrams, a member of the New York bar, argued the cause for amicus curiae, Courtroom Television Network (Robert S. Steinbaum, attorney).

PER CURIAM

This appeal concerns whether a sitting municipal court judgment may appear on television to comment on cases pending in other jurisdictions. After the matter was referred to the Advisory Committee on

Extrajudicial Activities, the Committee issued Opinion No. 13-95, which disapproved of Judge Broadbelt's appearances on "Court TV" and "Geraldo Live" as a commentator. We granted review, 142 N.J. 443 (1995).

I

The facts are undisputed. Petitioner, Evan W. Broadbelt, has been a municipal court judge since 1982 and serves five municipalities in Monmouth and Ocean counties. A well-respected municipal judge, Judge Broadbelt appeared on "Court TV" in excess of fifty times since 1992 to serve as a guest commentator. Since November 1994, Judge Broadbelt appeared on CNBC on three occasions to provide guest commentary on the "O.J. Simpson case," People v. Simpson, No. BA097211 (Cal. Super. Ct. 1995). He also appeared on a local television program in 1994 to discuss generally the jurisdiction and procedures of the municipal court. Judge Broadbelt did not receive compensation for any of those television appearances.

In December 1994, Judge Lawrence M. Lawson, A.J.S.C., requested that all municipal court judges notify the Assignment Judge before making any television appearances. After twice giving Judge Broadbelt permission to appear on "Geraldo Live," Judge Lawson, on March 20 1995, withdrew his approval and requested that Judge Broadbelt refrain from appearing on television. After Judge Broadbelt noted his disagreement with Judge Lawson's decision, Judge

Lawson referred the issue to the Advisory Committee on Extrajudicial Activities (Committee). That Committee, which is appointed by this Court, accepts inquiries about extrajudicial activities from a judge or this Court. R. 1:18A -1, -2. After an oral decision, the Committee issued Opinion No. 13-95, pursuant to Rule 1:18A-4, and determined that Judge Broadbelt's activities did not conform with Canon 2 of the Code of Judicial Conduct (Code) and Guideline IV.C.1. of the Guidelines for Extrajudicial Activities for New Jersey Judges.

The Code consists of seven canons that provide guidance to judges on the manner in which they are to conduct themselves. The canons are intended to maintain the integrity of the judiciary and to foster public confidence in the integrity of the judiciary. In re Seaman, 133 N.J. 67, 96 (1993); see Pressler, Current N.J. Court Rules, comment on Code of Judicial Conduct, Canons 1 and 2 (1996). Although we conclude that Judge Broadbelt's conduct violated Canons 3A(8) and 2B, we note that we have not previously addressed the issues presented by this appeal and that adequate guidance concerning appearances by judges on television may not previously have been available.

II

Although not the focus of the Committee's determination, we first consider whether Judge Broadbelt's commentary violated Canon 3A(8). Canon 3 provides that judges "should perform the duties of judicial office impartially and diligently." Extrajudicial duties should not encroach on or conflict with those duties. Report of Supreme Court Committee on Extrajudicial Activities, 117 N.J.L.J. 367, 367 (Mar. 20, 1986) (Report). Canon 3A(8) of the Code[1] provides:

> A judge should abstain from public comment about a pending or impending proceeding in any court and should require similar abstention on the part of court personnel subject to the judge's direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.

Judge Broadbelt argues that Canon 3(A) does not govern his televised legal commentary about pending

---

[1] In the Model Code of Judicial Conduct this provision is contained in Canon 3A(6).

cases because his conduct was extrajudicial in nature, and not a "duty of office" subject to the strictures of Canon 3. Additionally, petitioner and amicus both urge this Court to apply Guideline III.A.5.a (which prohibits only comment on cases pending in New Jersey courts), contending that under that Guideline the conduct is permissible. Amicus asks this Court to adopt a special test, pursuant to which a judge would be prohibited from commenting on a pending case only if there is a showing of harm to the judicial system.

The Committee argues that Judge Broadbelt's conduct, although extrajudicial, is governed by Canon 3A(8). Moreover, the Committee argues that although the Canon and the Guideline conflict, the Canon should control.

We find unpersuasive the judge's argument that the Canon does not apply because the judge's conduct is extrajudicial in nature. Canon 3A(8) specifically states that "[t]his subsection does not prohibit judges from making public statements in the course of their official duties. . . ." That language suggests that the Canon applies both to public statements made in the course of a judge's official duties and to statements made that are independent of those duties.

Similarly, we find unpersuasive the judge's argument that Guideline III.A.5.a governs his conduct in this case. Guideline III.A.5.a provides:

> To preserve the independence and prestige . . . respect for and confidence in the judicial office, and to dispel any doubt [about a judge's ability] to decide impartially any issue pending or likely to come before the judge, a judge, in speaking, lecturing or otherwise, shall not:
> a. comment on cases or proceedings pending in New Jersey courts except to explain what the issues are . . . .

Clearly, the Guideline limits the ban on public comments regarding pending cases to those public comments relating to cases pending in New Jersey. That limitation is inconsistent with the language of Canon 3A(8) that prohibits public comment regarding cases pending in any court. The phrase "any court" has been interpreted to refer to any court in any jurisdiction. See In re Hey ("Hey I"), 425 S.E.2d 221, 222-24 (W. Va. 1992) (concluding that phrase "any court" includes courts other than commenting judge's court); N.Y. Adv. Comm. on Judicial Ethics, Op. 93-133 (1994) (concluding that Canon prohibits judges from commenting on cases pending in any court, even those

outside of judge's jurisdiction). We note that the Guidelines are not intended to supplant or modify the Code. Report, supra, 117 N.J.L.J. at 367. Moreover, the canons are to be construed broadly to vindicate their purpose of maintaining public confidence in the judicial system. In re Blackman, 124 N.J. 547, 554 (1991).

Canon 3A(8) does not prohibit a judge from making statements in the course of his official duties. In re Schenck, 870 P.2d 185, 201 (Or.), cert. denied, ___ U.S. ___, 115 S. Ct. 195, 130 L. Ed. 2d 127 (1994). A judge may also make comments concerning court procedure. Disciplinary Counsel v. Souers, 611 N.E.2d 305, 306 (Ohio 1993). A judge is not forbidden from commenting on a case that is no longer pending. Goldman v. Nevada Comm'n on Judicial Discipline, 830 P.2d 107, 136-37 (1992); Wenger v. Commission on Judicial Performance, 630 P.2d 954, 965 (Cal. 1981). The Second Circuit Court of Appeals has ruled that the Canon is not violated when the judge's comments to the media about a pending case are a restatement of comments previously made by the commenting judge in open court. United States v. Yonkers Bd. of Educ., 946 F.2d 180, 184-85 (1991).

In In re Sheffield, 465 So. 2d 350 (Ala. 1984), the court observed that although judges are prohibited from commenting about the merits of a pending case, a general discussion of legal principles is permitted. Id. at 355. As such, "judges walk a fine line between the duties and prohibitions of Canon 3A[(8)]." Ibid. In Papa v. New Haven Fed'n of Teachers, 444 A.2d 196, 208 (Conn. 1982), the court stated that not all public comments made about a pending case will be improper and result in disqualification of the judge. Although the Canon clearly prohibits most forms of public comment about pending cases, the National Conference of State Trial Judges Committee on News Reporting and Fair Trial has suggested that

> [j]udges should encourage representatives of the news media [to] inquire of them for background information relating to the operation of the court system. While judges may not comments on the merits of a pending case, a judge may and should explain legal terms, and concepts, procedures, and the issues involved in the case so as to permit the news representatives to cover the case more intelligently. . . . Often there is no one, other than the judge, who is in a position to give a detailed

> and impartial explanation of the case to the news media.
>
> [Sheffield, supra, 465 So. 2d at 355 (quoting Nat'l Conf. of State Trial Judges Comm. on News Reporting and Fair Trial, Judicial Guidelines for Dealing with News Media Inquiries and Criticism (5th Draft, June 5, 1984)).]

In United States v. Garwood, 16 M.J. 863, 868 (A.C.M.R. 1983), aff'd, 20 M.J. 148 (C.M.A.), cert. denied, 474 U.S. 1005, 106 S.Ct. 524, 88 L. Ed. 2d 456 (1985), a trial judge engaged in press and media interviews on national broadcast networks, the television program "Nightline," and for the Associated Press. In those interviews, the judge expressed his opinion about tactical decisions by the defense, the relevance of certain discovery items, and his opinion on whether the defendant should take the stand in a pending case. Ibid. The reviewing court found the judge's conduct "inexcusable" and concluded that, no matter how well-motivated, the judge's comments crossed the line between permissible and impermissible commentary. Id. at 869.

In In re Benoit, 523 A.2d 1381, 1382-83 (Me. 1987), the court found it inappropriate for a judge, after a case was remanded, to write a letter to the

editor of a local newspaper defending his original sentences. The court stated that "citizens, whose legal rights and freedoms were at risk, were subjected to a public prejudgment of their cases by the very judge who was assigned to reimpose sentence. We cannot tolerate such a conspicuous display of judicial bias regarding pending cases." Id. at 1383 (footnotes omitted).

In Ryan v. Commission on Judicial Performance, 754 P.2d 724 (Cal. 1988), the court ruled that a judge clearly violated the dictates of Canon 3A(8) in three separate instances. In one, the judge discussed a draft opinion with the press before notifying the parties of his ruling. Id. at 738. In another, the judge made statements to the press concerning a pending contempt order. Id. at 738-39. Finally, the judge discussed another pending matter with the press and wrote a letter to the editor of a local newspaper explaining his sentence in a specific case. Id. at 739. In all three instances, the judge violated the Canon by commenting on pending cases. Id. at 738-39; see also Shapely v. Texas Dep't of Human Resources, 581 S.W.2d 250, 253 (Tex. Ct. App. 1979) (holding that judge violated Canon when he spoke to reporters about

pending case, and that judge "gave public vent to a bias and prejudice").

The New York Advisory Committee on Judicial Ethics recently considered an analogous issue. Applying the Canon, the Advisory Committee disapproved of a full-time judge's appearances on Court TV to discuss cases pending in courts outside of the state. N.Y. Adv. Comm. on Jud. Ethics, Op. 93-133 (1994). The Committee stated:

> Comments and observations made in that regard could prove troublesome, especially in view of their immediacy in relation to the events being discussed. These comments and observations are being made solely in the context of and with special reference to an ongoing litigation, the trial of which (or a portion [thereof]) has been telecast that day. Remarks by the judge could thus b seen as lending a judicial imprimatur to legal positions being advanced by one of the parties in an existing legal action, which legal positions may not have yet been ultimately determined. Such remarks would constitute public comment about a pending matter and, therefore, are not permitted . . . .
>
> [Ibid.]

The New Jersey Advisory Committee on Extrajudicial Activities has recommended that to avoid conduct in violation of Canon 3A(8) judges should not participate in seminars or symposia if the principal subject is a pending case, because "the give and take [of the discussion] might expose the judge to the hazard of . . . commenting on the issues [in the pending case], no matter how hard the judge tried to avoid the pitfalls." Adv. Comm. on Judicial Ethics, Op. 1-89 (1989); Adv. Comm. on Judicial Ethics, Op. 3-88 (1988). The Advisory Committee also recommended that a judge should decline an invitation to participate in a law school seminar on post-conviction issues in death penalty cases when the subject matter of the seminar is a pending capital case over which the judge presided. Adv. Comm. on Judicial Ethics, Op. 2-88 (1988).

The purpose of this Canon is to protect the integrity of the judiciary. See Benoit, supra, 523 A.2d at 1383. In Benoit, supra, the court stated that the Canon

> prevents a judge from publicly prejudging or creating the appearance that he is prejudging any aspect of an issue that has not been

> finally decided. It thereby minimizes the risk that such comments will either unfairly prejudge individuals' rights or create a public impression that citizens are not being treated fairly because different judges may not agree as to how those citizens' rights should be decided under the law.
>
> [Ibid.]

We find the Canon to be clear and unambiguous: a judge should not comment on pending cases in any jurisdiction. By prohibiting judges from commenting on pending cases in any court, we avoid the possibility of undue influence on the judicial process and the threat to public confidence posed by a judge from one jurisdiction criticizing the rulings or technique of a judge from a different jurisdiction. William G. Ross, Extrajudicial Speech: Charting the Boundaries of Propriety, 2 Geo. J. Legal Ethics 589, 598 (1989); see also David M. Rothman, California Judicial Conduct Handbook 1-39 (1990) (observing that judges should not comment on cases pending in courts outside of their jurisdictions because (1) such comments could affect outcome, (2) comments could appear to exert pressure on judge to decide a certain

way, and (3) such comments could undermine public confidence in judicial decisions).

We conclude that Judge Broadbelt should not have commented on pending cases from any jurisdiction. Moreover, we are persuaded that Judge Broadbelt's commentary on pending cases on "Court TV" and on "Geraldo Live" was inappropriate and had the potential to compromise the integrity of the judiciary in New Jersey. We direct the Advisory Committee to modify Guideline III.A.5.a to conform with Canon 3A(8).

III

We also determine whether Judge Broadbelt's conduct violated Canon 2B. Canon 2 states that a judge "should avoid impropriety and the appearance of impropriety in all activities." Canon 2B forbids a judge from "lend[ing] the prestige of office to

advance the private interests of others . . . ."[1] The Commentary to Canon 2B states:

> Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety and must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on personal conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.
>
> [Pressler, supra, comment on Canons 1 and 2.]

Judge Broadbelt argues that his appearance on commercial television programs to discuss pending cases is neither governed by nor violative of Canon 2B. The Advisory Committee insists that the judge's conduct violated Canon 2B because his regular television appearances allowed the prestige of his

---

[1] Guideline IV.C.1, on which the Advisory Committee also relied in finding that Judge Broadbelt's requested appearances would be improper, contains language similar to Canon 2B. The guideline provides: "A judge should avoid lending the prestige of the office to advance the private interests of others and should avoid conveying or permitting others to convey the impression that they are in a special position to influence the judge."

judicial office to advance the private interests of commercial television.

Our case law does not address this issue directly. None of our decisions concerning Canon 2 relate to a judge's appearance on a commercial television program. In In re Santini, 126 N.J. 291 (1991), we found that a municipal court judge violated Canon 2 and Rule 1:15-1(b) when he telephoned another municipal court judge concerning his client's arrest on a warrant for failure to appear at a zoning hearing. Id. at 293-95. We noted that a judge must not use his office to advance the private interest of others, nor should he convey or permit others to convey the impression that he is in a special position to exert influence. Id. at 295-96 (citing In re Murray, 92 N.J. 567, 570 (1983)); see also In re Anastasi, 76 N.J. 510, 514 (1978) (holding that judge should not be voluntary character witness for friend applying for racing license because to do so lends prestige of judicial office to advance private interest of another).

Similarly, in In re Blackman, supra, 124 N.J. 547, we found that a judge's attendance at a picnic hosted by a convicted felon violated Canon 2. We

reiterated that judges are in a unique position, and "must accept restrictions of their personal activities that other citizens might find burdensome and intrusive." Id. at 551. Because judges are the "subject of constant public scrutiny," ibid., they must be diligent to ensure that their conduct does not create the appearance of impropriety.

In its initial report, the Advisory Committee on Extrajudicial Activities emphasized the importance of preserving the integrity of the judiciary. Report, supra, 117 N.J.L.J. at 367. The Committee stated:

> In a free and democratic society, the independence and integrity of the judiciary are essential. The public expects judges to be honest, competent and devoted to the fair and impartial administration of justice. Any deviation from these high standards or any perception on the part of the public that judges are deficient in any of those qualities will inevitably result in a loss of confidence in the judiciary and seriously impair its effectiveness.
>
> [Id. at 367.]

That Committee also addressed the issue of judges writing for commercial, law-related publications, and promulgated Guideline III.C

concerning the circumstances under which a judge could write for a commercial publication. Most notably, judges writing for commercial publications may not receive any compensation for their work. The Committee noted:

> Writing differs from teaching and other forms of oral presentation in the degree of permanence of the record, the relative non-exclusivity of the body of readers and the opportunity for review and revision of the finished work. The need to avoid the appearance of prejudgment becomes more acute in the case of writing. A judge who has criticized the state of law or expressed a view on what the law ought to be in a published article or treatise may later, while on the bench, hear those views quoted by counsel during argument on the same issue. It would be difficult for opposing counsel or litigants to become convinced that the judge would respond affirmatively to a contrary argument.

[Report, supra, 117 N.J.L.J. at 368.]

In 1961, the ABA issued an opinion barring judges from appearing on commercial television programs that simulate or recreate judicial proceedings on the ground that such appearances are prohibited by Canon 2B. ABA Comm. on Professional

Ethics, Formal Op. 298 (1961). The opinion also stated, however, that it did not consider whether other programs such as panel discussions or interviews would be improper. Ibid. In the same year, the Association approved of a judge's appearance on "Meet the Press" because it was "distinctly . . . a public service type [of show]" similar to a news report dealing with matters of general public interest. ABA Comm. on Professional Ethics, Informal Op. C-230(g) (1961). Moreover, the Committee stated that "the nature of the program and the nature of the appearance of the lawyer or judge on it is the important thing and whether or not it is commercially sponsored is secondary." Ibid.

In Opinion No. 14-1991, the South Carolina Advisory Committee on Standards of Judicial Conduct addressed an analogous question. The Committee decided that Canon 2 prohibited a judge from answering questions on a radio talk show. S.C. Adv. Comm. on Standards of Judicial Conduct, Op. 14-1991 (1991). The Committee stated that "[i]n associating himself with the question and answer Radio Talk Show on a regular basis, the judge would clearly lend the prestige of his office to the advancement of the radio

station, in an area where the public perceives him to be an expert." Ibid. Furthermore, the Committee added that "[t]he spontaneous interchange between the judge and the call in listener could well affect the dignity of the judge, his office and interfere with his performance of his judicial office, as well as, having [a] negative impact on the dignity of other members of the judiciary and the effectiveness of their performance of their judicial duties." Ibid. The South Carolina Committee focused on the nature and effect of the judge's conduct, and not merely on whether the show was commercial or non-commercial.

The purpose of Canon 2B is to protect the independence and integrity of the judiciary. That a judge may not lend the prestige of judicial office to advance the private interests of others is well settled. However, the question whether a judge lends the prestige of office to a television program merely by appearing on that program is more difficult to answer. A number of factors must be taken into account: the frequency with which the judge appears on the program, the intended audience, the subject matter, and whether the program is commercial or non-commercial. In general, a judge should avoid

appearing on either commercial or non-commercial programs when the judge's association with that program compromises the independence and integrity of the judiciary.

In the instant case, Judge Broadbelt's regular appearance on commercial television violated Canon 2B. Because of the frequency of Judge Broadbelt's appearances, Judge Broadbelt became regularly identified with the program, thereby lending it the prestige of his judicial office.

Not every television appearance by a judge on commercial television will be improper, or will create the appearance of impropriety. For example, it might be permissible for a municipal court judge to make an isolated appearance on public television to comment on the role of municipal court judges in the judiciary. Similarly, a one-time appearance by a Superior Court judge on a commercial television program dealing wit the benefits and disadvantages of televising civil trials might be permissible. However, a judge's regular weekly appearance on a television program, whether the program was commercial or non-commercial, to comment on recent court decisions in New Jersey clearly would be improper.

Because our experience is evolving, we need not now attempt to prescribe precise limits for judicial appearances on television programs. We note only that exceptional caution and discretion are essential. We anticipate that the Advisory Committee on Extrajudicial Activities will perform a vital role in formulating standards to govern all such appearances in the future.

IV

The final Canon involved in this case is Canon 4. Canon 4 states that a judge "may engage in activities to improve the law, the legal system, and the administration of justice." It further provides:

> A judge, subject to the proper performance of judicial duties, may engage in the following quasi-judicial activities if in doing so the judge does not cast doubt on the judge's capacity to decide impartially any issue that may come before the court and provided the judge is not compensated therefor:
>
> A. A judge may speak, write, lecture, and participate in other activities concerning the law, the legal system, and the

administration of justice.

B. A judge may teach concerning the law, the legal system, and the administration of justice.

[Code of Judicial Conduct, Canon 4.]

Petitioner insists that his conduct is governed and permitted by Canon 4 because it is extrajudicial in nature and constitutes teaching about the judicial system. The Committee argues that the judge's conduct is not subject to review solely under Canon 4 because it is extrajudicial in nature; rather, the conduct is to be examined under each of the canons to determine its propriety.

Canon 4 does not excuse the violations of other canons. Schenck, supra, 870 P12d at 202; In re Miller, 644 So. 2d 75, 78 (Fla. 1994). In Opinion 93-133, supra, the New York Advisory Committee on Judicial Ethics concluded that although a judge's comments concerning a pending case may be of educational value under Canon 4, because the comments violate another canon they are not permitted. See also Adv. Comm. on Judicial Ethics, Op. 3-88, supra (concluding that judge's comments about pending case,

which are barred by Canon 3A(8), are not excused because they could be of some assistance to court under Canon 4).

We have no doubt that Petitioner Broadbelt's commentary was informative and educational. Nevertheless, conduct that is violative of another canon is not excused because it appears to be authorized by Canon 4. Although Petitioner's conduct may have included teaching about the law, the legal system, and the administration of justice, that conduct is not permitted if it violates another canon. Accordingly, because Petitioner's conduct violated Canons 3A(8) and 2B, Canon 4 does not excuse it.

V

Finally, we address the constitutional question whether placing restrictions on a judge's speech violates the First Amendment. A judge does not relinquish his or her First Amendment rights on ascending to the bench. In re Rome, 542 P.2d 676, 684 (Kan. 1975); William G. Ross, Extrajudicial Speech: Charting the Boundaries of Propriety, 2 Geo. J. Legal Ethics, 589, 594 (1989). However, limitations may be placed on a judge's First Amendment rights. See

Halleck v. Berliner, 427 F. Supp. 1225, 1239 (D.D.C. 1977); see also Scott v. Flowers, 910 F.2d 201, 212 (5th Cir. 1990) (observing that "state may restrict the speech of elected judges in ways that it may not restrict the speech of other elected officials"); In re Hey, ("Hey II"), 452 S.E.2d 24, 30 (W. Va. 1994) (same). In analyzing a judge's right to speak freely, courts have employed different constitutional standards: the Pickering public-employee balancing test, the strict-scrutiny test, and the hybrid Pickering/strict-scrutiny test. In addition, commentators have advocated that courts apply the Gentile middle-tier scrutiny standard to regulate judicial speech. Erwin Chemerinsky, Is it the Sien's Call?: Judges and Free Speech While Cases are Pending, 28 Loy. L.A. L. Rev. 831, 842 (1995).

In Pickering, the Court observed that although public employees do not shed their constitutional protection on entering the workplace, a public employee's free speech may be limited. Pickering v. Board of Educ., 391 U.S. 563, 568, 88 S. Ct. 1731, 1734, 20 L. Ed. 2d 811, 817 (1968); see Hey II, supra, 452 S.E.2d at 30-31; Schenck, supra, 870 P.2d at 204; Scott, supra, 910 F.2d at 210. The Pickering test has

two prongs: first, whether the speech addresses a matter of legitimate public concern; and second, whether the public employee's right to speak freely outweighs the public employer's interest in regulating the speech to promote the efficiency of the public services it performs. Id. at 568, 88 S. Ct. at 1734-35, 20 L. Ed. 2d at 817.

Some courts have applied the strict-scrutiny test to this issue. To pass constitutional muster under strict scrutiny, regulations attempting to restrict a judge's right to speak freely must be (1) narrowly tailored to serve a compelling governmental interest; and (2) the least restrictive means available to achieve that interest. Barone v. Department of Human Services, 107 N.J. 355, 365 (1987) (citing Graham v. Richardson, 403 U.S. 365, 91 S. Ct. 1848, 29 L. Ed. 2d 534 (1971).

West Virginia and Florida have applied a hybrid Pickering/strict-scrutiny test. In Hey II, supra, the West Virginia Supreme Court found that the compelling needs in maintaining the integrity of the judiciary justified "unusually stringent restrictions on judicial expression . . . ." Hey II, supra, 452 S.E.2d at 30. Finding that the public

employee/Pickering cases provided an appropriate analogy, ibid, the court defined the test as a two-part inquiry: (1) whether the state could accomplish its legitimate interest in restraining a judge's speech through narrowly-tailored limitations, and (2) whether the regulation exceeded that which is necessary to accomplish the state's interests. Id. at 31. Engaging in that analysis, the court found that Canons 1, 2, and 3, which restricted a judge's free speech rights, were not violative of the First Amendment. Ibid.; see also In re Judicial Conduct, 603 So. 2d 494, 498 (Fla. 1992) (finding that judge's activity could be regulated because of special role judges play in society, and finding that Canons involved compelling state interest and were narrowly drawn to serve that interest).

We have applied a middle-tier scrutiny test in cases involving regulation of an attorney's speech about pending cases. In re Rachmiel, 90 N.J. 646, 654 (1982); In re Hinds, 90 N.J. 604, 614 (1982). In Hinds, we found that a disciplinary rule forbidding an attorney from commenting on a pending case did not

violate the First Amendment.[3] We applied a two-prong test, in which a regulation will be found constitutional if it (1) "further[s] an important or substantial governmental interest unrelated to the suppression of expression"; and (2) is no more restrictive than necessary to protect the governmental interest involved. Hinds, supra, 90 N.J. at 614; Rachmiel, supra, 90 N.J. at 654-55.

When presented with a similar issue, the United States Supreme Court adopted the Hinds middle-tier scrutiny test and concluded that a state may regulate an attorney's speech if it creates a "substantial

---

[3] The Disciplinary Rule in question provided:

> During the selection of a jury or the trial of a criminal matter, a lawyer or law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extrajudicial statement that he expects to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial. . . .
>
> [DR 7-107(D), superseded by R.P.C. 3.6.]

likelihood of materially prejudicing [an adjudicatory] proceeding." Gentile v. State Bar of Nevada, 501 U.S. 1030, 1075-76, 111 S. Ct. 2720, 2745, 115 L. Ed. 2d 923-24 (1991).

Although we believe that the imposition of restrictions on a judge's free speech rights would probably pass constitutional muster under any of those standards, we find most appropriate the Gentile/Hinds standard. Under that standard, the regulation of a judge's speech will be upheld if it furthers a substantial governmental interest unrelated to suppression of expression, and is no more restrictive than necessary. Avoiding material prejudice to an adjudicatory proceeding is one example of a governmental interest sufficient to uphold restrictions on a judge's speech. The preservation of the independence and integrity of the judiciary and the maintenance of public confidence in the judiciary -- the interests underlying Canons 3A(8) and 2B -- are obviously interests of sufficient magnitude to sustain those Canons under the Gentile/Hinds standard, and we are satisfied that the restrictions on a judge's speech imposed by those Canons are no greater than

necessary. Accordingly, we uphold the constitutionality of their application to Petitioner.

VI

As modified by this opinion, we affirm Opinion No. 13-95 of the Advisory Committee on Extrajudicial Activities.

JUSTICES HANDLER, POLLOCK, O'HERN, GARIBALDI, STEIN, and COLEAN join in the opinion of the Court.

SUPREME COURT OF NEW JERSEY

No. A-71
SEPTEMBER TERM 1995

ON APPEAL FROM _____

ON CERTIFICATION TO _____

On reviw of an opinion of the Advisory Committee on Extrajudicial Activities.

IN RE: THE INQUIRY OF EVAN W.

BROADBELT, J.M.C.

DECIDED October 10, 1996
Justice Handler PRESIDING
OPINION BY Per Curiam
CONCURRING OPINION BY _____
DISSENTING OPINION BY _____

CHECKLIST	MODIFY & AFFIRM		
JUSTICE HANDLER	X		
JUSTICE POLLOCK	X		
JUSTICE O'HERN	X		
JUSTICE GARIBALDI	X		
JUSTICE STEIN	X		
JUSTICE COLEMAN	X		
TOTALS	6		

SUPREME COURT OF NEW JERSEY
E-95 September Term 1994
40,456

IN RE: THE INQUIRY OF
EVAN W. BROADBELT, J.J.C.,

C O R R E C T E D
O R D E R

This matter having been duly presented to the Court on a petition for review filed by Evan Broadbelt, J.M.C., pursuant to Rule 1:18A-7, and the Court having considered the same, and good cause appearing;

It is ORDERED that the petition for review of Opinion #13-95 of the Advisory Committee on Extrajudicial Activities is granted.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 5th day of July, 1995.

Stephen W. Townsend
CLERK OF THE SUPREME COURT

I hereby certify that
the foregoing is a true
copy of the original on
file in my office.

Stephen W. Townsend
CLERK OF THE SUPREME COURT
OF NEW JERSEY

SUPREME COURT OF NEW JERSEY
ADVISORY COMMITTEE ON EXTRAJUDICIAL ACTIVITIES

#13-95

June 23, 1995

ADVISORY LETTER

Hon Evan W. Broadbelt
PO Box 648
Allenwood, New Jersey 08720

Dear Judge Broadbelt:

You will remember that you were advised by letter of April 18, 1995, that the Advisory Committee had voted by telephone poll to disapprove your appearances on Court TV and Geraldo Live as a commentator on the O. J. Simpson trial. In that letter you were advised as follows: "While the Committee disapproved the activity, because members had different reasons for their positions it was decided to issue a formal letter of advice only after the matter is considered at the Committee's next meeting. It is the Committee's normal procedure to reconsider at the next meeting, and ratify or not, all advice given by telephone poll between meetings."

The Committee met on June 16, 1995 at which time the matter was brought up for consideration. The Committee decided to ratify its previous vote to disapprove your appearance on Court TV and Geraldo Live. The Committee was of the view that such appearances would not be appropriate under the relevant portion of Canon 2 (a judge should not lend

the prestige of office to advance the private interests of others), and Guideline IVC1.

Yours very truly,

Nancy R. Lichtenstein, Esq.

/db

cc: Honorable Baruch S. Seidman

SUPREME COURT OF NEW JERSEY
ADVISORY COMMITTEE ON EXTRAJUDICIAL ACTIVITIES

Opinion #13-95

April 18, 1995

ADVISORY LETTER

Hon Evan W. Broadbelt
PO Box 648
Allenwood, New Jersey 08720

Dear Judge Broadbelt:

After reviewing your materials dated March 20 and March 31, 1995, the Advisory Committee has voted to disapprove your appearances on Court TV and Geraldo Live a commentator on the O. J. Simpson trial. While the Committee disapproved the activity, because members had different reasons for their positions it was decided to issue a formal letter of advice only after the matter is considered at the Committee's next meeting. It is the Committee's normal procedure to reconsider at the next meeting, and ratify or not, all advice given by telephone poll between meetings. The next meeting is scheduled tentatively for some time in May.

You will understand, of course, that the committee's opinion is advice only and that the responsibility for decision remains with the individual judge.

Yours very truly,

Nancy R. Lichtenstein, Esq.

/db
cc: Honorable Baruch S. Seidman
Honorable Lawrence M. Lawson, A.J.S.C.

SUPERIOR COURT OF NEW JERSEY

March 20, 1995

Honorable Evan W. Broadbelt, J.M.C.
Wall Township Municipal Court
Bailey and Allaire Corner Roads
Wall Township, New Jersey 07719

Dear Judge Broadbelt:

After further reviewing the Code on Judicial Conduct and the Guidelines For Extrajudicial Activities, please be advised that I have to vitiate my prior approval of you appearing on the "Geraldo" show as a legal commentator. Your appearance on "Geraldo" violates Canon 2B and Guideline IVA(1)(b)(1)(2).

Canon 2B of the Code of Judicial Conduct in pertinent part provides: "...A judge should not lend the prestige of office to advance the private interests of others;..." Your appearance on the "Geraldo" show violates this Canon as you appearing as a Municipal Court Judge advances commercial Television. As a Judge, your appearance is a violation of Canon 3A(8). Canon 3A(8) provides as follows:

"A judge should abstain from comment about a pending or impending proceeding in any court and should require similar abstention on the part of court personnel subject to the judge's direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court." (Emphasis supplied)

"Any Court" has been interpreted to include courts within New Jersey and matters that are pending throughout the United States.

Guideline 1VA(1)(b)(1)(2) provides as follows:

b. Because of the range of permissible activities, judges should be particularly careful:

March 20, 1995

Honorable Evan W. Broadbelt, J.M.C.
Wall Township, New Jersey 07719

1) not to engage in activities that might detract from the dignity of the judicial office or interfere with the performance of judicial duties;

2) to examine the composition and purposes of any organization, group or club before joining, speaking to or otherwise becoming associated with it, in order to avoid any appearance of bias or association with bodies or groups having clear interests in litigation in state or federal courts.

As a municipal court judge, you must at all times be sensitive to the public's perception of your actions. A part-time municipal court judge, such as yourself, who maintains a private practice, must be particularly circumspect. You must at all times keep separate your dual role as a judge and as an attorney. You cannot use your judicial office to promote another's interest.

Therefore I am requesting that you refrain from appearing on the "Geraldo" show. If you disagree with my reading of the above, please advise so that I may seek an opinion of the Supreme Court Committee on Extrajudicial Activities or the Supreme Court.

Very truly y ours,

LML:nr
A.J.S.C.

LAWRENCE M. LAWSON,

CC: William W. Carpenter, TCA
Joseph D. Barba, Esq. ATCA
Dennis Bliss, Municipal Court Services, AOC

EVAN W. BROADBELT

Attorney at Law

March 20, 1995

Honorable Lawrence M. Lawson, A.J.S.C.
Monmouth County Courthouse
Post Office Box 1266
Freehold, New Jersey 07728

Re: "Rivera Live"
"Court TV"

Dear Judge Lawson:

Thank you for your letter of even date regarding Your Honor's position with respect to my appearances on the above programs. Thank you also for the favor of a copy of Your Honor's letter to the Administrative Office of the Courts regarding this issue.

By way of background, let me advise Your Honor that I have appeared on Court TV since September, 1992 and Rivera Live since November, 1994. Court TV's format is designed to present live trials, with commentary by guests and anchors, to explain the process and procedures of the trial. A copy of the instructions for Commentators is attached for your review.

The format on "Rivera Live" is a panel discussion among four or five guests, concerning the events of the day in the trial of California v.

Simpson. Again, the focus is on the process and procedure of the trial.

I am not compensated for appearances on either program, and the viewers are not charged in any way.

Canon 2B on the Code of Judicial Conduct does not preclude my appearance on either program, since there is no charge for the viewer and the programs are aired on a daily basis. Whether or not I appear, although I am grateful that you believe that I advance commercial television.

Similarly, Canon 3A(8) does not preclude my appearance on either program. That Canon is designated "Adjudicative Responsibilities". It speaks directly to matters pending in the Court where I am sitting, regarding matters which are or may be heard by me. In fact, it specifically does not prohibit a judge from "...explaining for public information the procedures of the court."

Finally, I respectfully submit that Your Honor's citation of Guideline 1VA(1)(b)(1)(2) is misplaced. That Guideline is specifically entitled "NON-LAW RELATED ACTIVITIES". I submit that Guideline III, A, entitled "LAW RELATED ACTIVITIES" Lecturing, Speaking, Appearances as Panel Member, etc. is the guideline which applies to this situation. I follow all of those items in my appearances.

I submit most respectfully that were I appearing on Law Day to speak to students, senior citizens, or any other group which did not charge admission, and for which I received no compensation, such activity would be encouraged. The mere fact that such appearance is televised does not change the nature of the presentation.

Respectfully Yours,

EVAN W. BROADBELT, J.M.C.

EWB:bm
encl

SUPERIOR COURT OF NEW JERSEY

March 20, 1995

Nancy R. Lichtenstein, Chief,
Judge Support Services
Administrative Office of the Courts
CN 037
Trenton, New Jersey 08625

Re: Hon. Evan W. Broadbelt, J.M.C.

Dear Nancy,

Judge Evan W. Broadbelt, J.M.C., a Municipal Court Judge of several municipalities in Monmouth and Ocean counties has requested permission from me to appear on "Geraldo Live" on CNBC and "Court TV".

I had given Judge Broadbelt permission to appear on the "Geraldo Live" show on two other occasions; however, after reviewing the Code of Judicial Conduct and the Guidelines of Extrajudicial Activities and speaking with Dennis Bliss of the Administrative Office of the Courts, I have concluded that it wold be improper for Judge Broadbelt to appear on either show as requested. I have attached for your perusal a copy of the letter which I have forwarded to Judge Broadbelt wherein I have set forth the basis of my understanding as to why I feel it would be improper for him to appear. In my letter to Judge Broadbelt, I have mae reference to the "Geraldo" show which is the late afternoon program when, in fact, the show he has requested permission to appear on is "Geraldo Live" as stated above. My letter does not mention "Court T.V." which was inadvertently not included as well.

I also made inquiry of Judge Broadbelt as to whether or not he is receiving compensation for these appearances and he has assured me that he is not.

March 20, 1995

Nancy Lichtenstein, Chief
Judge Support Services
Administrative Office of the Courts

Judge Broadbelt has asked that this matter be considered by the Committee on an emergency basis as he has a scheduled appearance this Wednesday, March 22, 1995 at 3:00 P.M. on "Court T.V."

If you are in need of any further information, please contact me.

Very truly yours,

LML:nr
A.J.S.C.

LAWRENCE M. LAWSON,

cc: Hon. Evan W. Broadbelt, J.M.C.
William W. Carpenter, T.C.A.
Joseph D. Barba, A.T.C.A.
Dennis Bliss, Municipal Court Services, AOC

TOWNSHIP OF WALL

March 31, 1995

Nancy R. Lichtenstein, Esquire, Chief
Judge Support Services
Administrative Office of the Courts
CN 037
Trenton, New Jersey 08625

Re: Television Commentary

Dear Ms. Lichtenstein:

I enclose herewith an original and two copies of Inquiry, Statement of Facts and Memorandum in connection with the above matter, to be submitted to the Advisory Committee on Extrajudicial Activities in accordance with the provisions of Rule 1:18A-3.

Since this matter was submitted to the Committee at the request of The Honorable Lawrence M. Lawson. A.J.S.C., last week, and apparently ruled upon on an oral basis without the benefit of my letter and exhibit to Judge Lawson, I request that the Committee review these documents and respond in accordance with Rule 1:18A-4.

In view of the fact that this matter involves ongoing requests to appear to provide commentary and that I have declined to appear in accordance with the request of Judge Lawson until this matter has been reviewed by the Committee on this inquiry, I respectfully request that the Committee respond at its earliest convenience.

Very truly yours,

EVAN W. BROADBELT, J.M.C.

EWB:tmk
Enclosures

INQUIRY

May a part-time Municipal Court Judge appear as a guest commentator on Court TV or similar programs to provide commentary to the public regarding the criminal justice system and trials outside of New Jersey, such a California v. Simpson?

STATEMENT OF FACTS

I have been a Municipal Court Judge since 1982 and am presently serving as a Municipal Court Judge in four municipalities in Monmouth County and one in Ocean County. I served as an Assistant Monmouth County Prosecutor for two years, a Municipal Prosecutor in two municipalities, the Secretary of the District IX Ethics Committee for 10 years, and for the past five years have been a member of the Supreme Court Committee on Municipal Courts.

Since September, 1992, I have served as a guest commentator, without compensation, on Court TV, and have appeared in excess of 50 times to provide commentary on criminal trials in various jurisdictions, in accordance with the provisions of Canon 4 of the Code of Judicial Conduct and the guidelines for guest commentators for Court TV, a copy of which is attached.

Since November, 1994, I have appeared on the "Rivera Live" program on CNBC on three occasions, again in accordance with the provisions of Canon 4, to provide guest commentary on the matter of California v. Simpson. These appearances, also, are without compensation.

On December 8, 1994, I appeared on a local cable television program, Legal Line, hosted by Robert Abrams, Esquire, to discuss the jurisdiction and procedures of the municipal courts, generally. I was contacted by Hon. Lawrence M. Lawson, A.J.S.C. and advised that I was required to obtain prior approval before making such an appearance. The matter was discussed, and thereafter, Judge Lawson issued the attached memorandum, which indicated to me that he agreed with my position that prior approval was not

required but that he requested prior notification of any future appearances. Thereafter, I followed that memorandum prior to making any further appearances.

On March 20, 1995, after prior telephone advice, I received the attached letter from Judge Lawson. I was surprised that Judge Lawson had to "vitiate" his prior approval and request that I refrain from appearing on the television programs since I have been doing so for the past two and one half years, and in fact, judges from other jurisdictions have also appeared on numerous occasions.

I am complying with that request and have, in fact, declined three invitations to appear as a result.

On March 22, 1995, I was advised by Judge Lawson by telephone that the Advisory committee on Extrajudicial Activities had considered his letter of March 20, 1995, and my letter and exhibits dated March 20, 1995, and had agreed with Judge Lawson's position on the issue.

I telephoned Nancy R. Lichtenstein, Esquire, at the suggestion of Judge Lawson, to inquire as to the basis of the decision of the Committee, and Ms. Lichtenstein advised me that the Committee had not received a copy of my letter and attachments but had determined that the appearances violated the provisions of Canon 3A(8).

I am submitting this inquiry for compete review of the issue by the Committee.

MEMORANDUM

POINT I

CANON 3 OF THE CODE OF JUDICIAL CONDUCT APPLIES TO JUDICIAL CONDUCT BY A JUDGE IN PERFORMING THE DUTIES OF JUDICIAL OFFICE.

The relevant Canon of the Code of Judicial Conduct to be reviewed for this inquiry is Canon 3. Specifically in question is the provision contained in Canon 3A(8), as follows:

"Canon 3. A Judge Should Perform the Duties of Judicial Office Impartially an Diligently

The judicial duties of a judge take precedence over all other activities. Judicial duties include all the duties of the office prescribed by law. In the performance of these duties, the following standards apply:

A. Adjudicative Responsibilities.

(8) A judge should abstain from public comment about a pending or impending proceeding in any court and should require similar abstention on the part of court personnel subject to the judge's direction and control This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court, ..."

Judge Lawson and the Committee, apparently, have interpreted this provision to apply to public comments about any case in any court in New Jersey or anywhere else in the United States.

Canon 3 is divided into two separate sections. They are A. Adjudicative Responsibilities and B. Administrative Responsibilities.

The 10 subparagraphs in section A. all speak to the conduct of a judge in relation to the performance of the judicial duties of the office, not quasi-judicial or extra-judicial activities. Subparagraph (8) is part and parcel of the description of the manner in which a judge must perform judicial duties, which are "all the duties of the office prescribed by law."

That Canon is clearly intended to address the conduct of the judge in the court where the judge presides.

An appearance as a panel member to discuss legal issues, the process and procedure of a trial, whether or not that discussion is televised, is not included in the definition of "judicial duties" as defined in Canon 3.

Such an appearance is a quasi-judicial and extra-judicial activity. As such, it is clearly governed by the provisions, and restrictions, of Canon 4, and not Canon 3, unless the judge is presiding or will be presiding in that trial.

POINT II

GUEST COMMENTARY ON COURT TV IS A QUASI-JUDICIAL ACTIVITY GOVERNED BY THE PROVISIONS OF CANON 4.

The controlling Canon on the issue is Canon 4, which permits law related activities, subject to the specific limitations set forth in that Canon, as follows:

"Canon 4 A Judge May Engage in Activities to Improve the Law, the Legal System, and the Administration of Justice

A judge, subject to the proper performance of judicial duties, may engage in the following quasi-judicial activities if in doing so the judge does not cast doubt on the judge's capacity to decide impartially any issue that may come before the court and provided the judge is not compensated therefor:

A. A judge may speak, write, lecture and participate in other activities concerning the law, the legal system, and the administration of justice...."

The report of the Supreme Court Committee on Extrajudicial Activities (Abridged) states:

"...Since Canon 4, which deals with quasi-judicial activities to improve the law, the legal system and the administration of justice, is essentially permissive, the focal point was not the activity itself in most instances; rather, it was the restrictions or limitations most appropriate for each...." (emphasis supplied) page 15.

Indeed, a majority of the Committee determined that prior approval was not required for these activities, as stated in the Committee Report:

"Significantly, the Code does not require prior approval of any of the activities in question except teaching....." page 17.

The activity involved in this inquiry clearly is not a judicial duty as defined in Canon 3. It is a quasi-judicial activity which is subject to the provisions of Canon 4.

The Committee recognized that distinction in the Report:

"...To the extent that the Code permits, and in many cases encourages, extrajudicial activities, prior approval is unwarranted unless specifically required by the Code, Court Rules or administrative directives. To seek permission to do that which is already permitted without prior approval is redundant.

By consulting the Code and applying the guidelines, judges should be able to resolve the propriety of the contemplated activity and to heed such limitations as may be placed upon the activity itself without further assistance...." page 15.

The relevant Guideline in issue is Guideline III. LAW RELATED ACTIVITIES. Those activities are permitted, without prior approval, subject to the specific limitations on the content of the commentary. More specifically, the Guideline provides in IIIA.5a.:

"... a judge shall not:

a. comment on cases or proceedings pending in New Jersey courts except to explain what the issues are:..."

Clearly the Guidelines do not embrace the interpretation of a ban on all comment on cases pending throughout the United States, nor for that matter do they completely prohibit comments on matters pending in New Jersey.

CONCLUSION

The clear trend over the past twenty years has been to narrow the gap between the legal profession and judiciary, and the public, as evidenced by the inclusion of lay members on disciplinary committees in both areas, the opening of ethics matters to the public, the promulgation of the Guidelines and the recent amendment to Guideline III, which now provides that "...judges are encouraged to accept invitations to speak, lecture, appear as a panel member or moderator of a panel discussion on topics related to the law..." Guideline III.A.I..

It is contrary to that trend and the stated findings of this Committee in its Report to the Supreme Court to "raise the specter of censorship" (page 18) when "(j)udges will have the benefit of guidelines from which they should be able to decide for themselves the propriety of activities that are not inherently suspect, but are, on the contrary, permitted and even encouraged" (page 17).

For the foregoing reasons and authorities cited in support thereof, it is respectfully requested that the Committee issue an advisory opinion that my appearance as a guest commentator on Court TV and similar programs is governed by the provisions of Canon 4 of the Code of Judicial Conduct an the Guidelines promulgated to facilitate compliance with that Canon.

Respectfully Submitted,

EVAN W. BROADBELT, J.M.C.

EWB:tmk

SUPERIOR COURT OF NEW JERSEY

MEMORANDUM

TO: All Municipal Court Judges

FROM: Honorable Lawrence M. Lawson, A.J.S.C.

DATE: December 28, 1994

RE: Participation in Television/Radio Coverage and or Programs

As you are aware media coverage of court proceedings is subject to the Supreme Court Guidelines For Still And Television Camera And Audio Coverage of Proceedings In The Courts Of New Jersey.

In addition, on rare occasions, judges or court personnel may be requested to participate in television or radio programs or other coverage (e. g. panel discussions, educational programs, etc.) If your court receives such a request, or if you ever seek such participation, I ask that you discuss the matter with me prior to any agreement to participate.

JDB/bvb

cc:
William W. Carpenter, T.C.A.
Joseph D. Barba, Esq., A.T.C.A.
William Lynch, Statistical Analyst
All Municipal Court Administrators

RULE 1:18a. ADVISORY COMMITTEE ON EXTRAJUDICIAL ACTIVITIES

1:18a-1. Appointment and Organization

The Supreme Court shall appoint an Advisory Committee on Extrajudicial Activities consisting of at least 9 members serving for terms of 2 years with the terms of approximately one half of the members expiring each year. The Committee shall include one practicing attorney and one public member. A vacancy occurring during a term shall be filled for the unexpired portion thereof. The Court shall annually designate a member of the Committee to serve as chairperson. The Administrative Director of the Courts or designee shall serve as secretary of the Committee.

Note: Adopted November 29, 1988, to be effective January 2, 1989.

1:18A-2. Jurisdiction

The Committee shall accept inquiries concerning extrajudicial activities only from a judge or the Supreme Court.

Note: Adopted November 29, 1988, to be effective January 2, 1989.

1:18A-3. Form of Inquiry

All inquiries shall be addressed to the secretary, who shall transmit them to the Committee. They shall be in writing, shall set out the factual situation in detail, and shall be accompanied by a short memorandum citing the relevant Code of Judicial Conduct or Guidelines for Extrajudicial Activities.

Note: Adopted November 29, 1988, to be effective January 2, 1989.

1:8A-4. Disposition of Inquiries

Except as may otherwise be determined by the Committee in the case of routine inquiries that

require a response before the Committee can act, no opinion shall be given by the Committee unless concurred in by a majority thereof. In every matter, the secretary shall convey the Committee's response in writing to the judge making the inquiry. The Committee may, in its discretion, issue, in addition, a formal opinion for distribution to all judges and make suitable arrangements for its publication. Formal opinions shall not, insofar as practicable, identify the judge making the inquiry.

Note: Adopted November 29, 1988, to be effective January 2, 1989.

1:18A-5. Inquiries from Supreme Court

The Committee shall consider and advise the Supreme Court or render opinions on such matters as the Supreme Court may submit to it from time to time. Those opinions shall not be published without prior approval of the Court.

Note: Adopted November 29, 1988, to be effective January 2, 1989.

1:18A-6. Procedure

The committee shall prescribe the methods and procedure to be followed in considering inquiries and expressing opinions.

Note: Adopted November 29, 1988, to be effective January 2, 1989.

1:18A-7. Petitions for Review

(a) Notice. Within 30 days after a judge is notified in writing of the response to the inquiry, or, if a formal opinion has been rendered, within 20 days after its publication, the judge, if aggrieved thereby, may seek review thereof by filing a notice of petition for review with the Clerk of the Supreme Court.

(b) Record on Petition for Review. If the petition for review is granted, the record on review shall be the formal opinion, if any, or the

Committee's written response to the judge issued pursuant to R. 1:18A-4, the inquiry or memorandum submitted, and any documents relied on by the Committee in arriving at its determination.

(c) Form of Petition for Review. A petition for review shall contain a short statement of the matter involved, the question presented, the errors complained of, and the arguments in support of the petitioner's position.

(d) Service and Filing of Petition for Review. Within 10 days after filing of the notice of petition for review, 2 copies of the petition shall be served on the secretary of the Committee and 9 copies thereof shall be filed with the Clerk of the Supreme Court.

(e) Final Determination. The final determination of a petition for review may be either by written opinion or by order of the Supreme Court and shall state whether the opinion or other action of the Committee is affirmed, reversed, or modified, or shall provide for such other final disposition as is appropriate.

Note: Adopted November 29, 1988, to be effective January 2, 1989.

APPENDIX TO PART I
CODE OF JUDICIAL CONDUCT

NOTE: The following Code of Judicial Conduct of the American Bar Association, as amended by the New Jersey Supreme Court, replaces the Canons of Judicial Ethics of the American Bar Association.

Canon 1 A judge should uphold the integrity and independence of the judiciary

Canon 2 A judge should avoid impropriety and the appearance of impropriety in all activities

Canon 3 A judge should perform the duties of judicial office
impartially and diligently

Canon 4 A judge may engage in activities to improve the law, the
legal system and the administration of justice

Canon 5 A judge shall so conduct the judge's extra-judicial
activities as to minimize the risk of conflict with
judicial obligations

Canon 6 A judge shall not receive compensation for quasi-judicial
and extra-judicial activities

Canon 7 A judge shall refrain from political activity

APPLICABILITY

Compliance with the Code of Judicial Code

1. A Judge Should Uphold the Integrity and Independence of the Judiciary

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should personally observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

2. A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities

A. A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow family, social, political, or other relationships to influence judicial conduct or judgment. A judge should not lend the prestige of office to advance the private interests of others; nor should a judge convey or permit others to convey the impression that they are in a special position of influence. A judge shall not testify as a character witness.

C. A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin.

3. A Judge Should Perform the Duties of Judicial Office Impartially and Diligently

The judicial duties of a judge take precedence over all other activities. Judicial duties include all the duties of the office prescribed by law. In the performance of these duties, the following standards apply:

A. Adjudicative Responsibilities.

(1) A judge should be faithful to the law and maintain professional competence in it. A judge should be unswayed by partisan interest, public clamor, or fear of criticism.

(2) A judge should maintain order and decorum in judicial proceedings.

(3) A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and should not permit lawyers, court officials, and others subject to the judge's direction and control to display impatience or discourtesy or to detract from the dignity of the court.

(4) A judge should be impartial and should not discriminate because of race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status, or disability.

(5) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, color, religion, age, sex, sexual orientation, national origin, language, martial status, socioeconomic status or disability against parties, witnesses, counsel, or others. This section does not preclude legitimate advocacy when race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status or disability, or other similar factors are issues in the proceeding.

(6) A judge should accord to every person who is legally interested in a proceeding, or that person's lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to or the subject matter of a proceeding if the judge gives notice to the parties of the person to be consulted and the nature of

the advice, and affords the parties reasonable opportunity to participate and to respond.

(7) A judge should dispose promptly of the business of the court.

(8) A judge should abstain from public comment about a pending or impending proceeding in any court and should require similar abstention on the part of court personnel subject to the judge's direction and control This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.

(9) A judge should permit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions only in accordance with the guidelines promulgated by the Supreme Court and subject to the restrictions contained therein.

(10) A judge shall not commend or criticize jurors for their verdict, other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.

r. A Judge May Engage in Activities to Improve the Law, the Legal System, and the Administration of Justice

A judge, subject to the proper performance of judicial duties, may engage in the following quasi-judicial activities if in doing so the judge does not cast doubt on the judge's capacity to decide impartially any issue that may come before the court and provided the judge is not compensated therefor:

A. A judge may speak, write, lecture, and participate in other activities concerning the law, the legal system, and the administration of justice.

B. A judge may teach concerning the law, the legal system, and the administration of justice.

C. A judge may appear at a public hearing before an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice upon notice to and approval by the Supreme Court, and may otherwise consult with an executive or legislative body or official, but only on matters concerning the administration of justice with which the judge is charged with responsibility by the Rules of Court.

D. A judge may serve as a member, officer or director of a nongovernmental organization devoted to the improvement of the law, the legal system, or the administration of justice. A judge may not, however, assist such an organization in raising funds nor may a judge participate in their management and investment. A judge may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, legal system, and the administration of justice.

5. A Judge Shall so Conduct the Judge's Extra-Judicial Activities as to Minimize the Risk of Conflict with Judicial Obligations

A. Extra-judicial Activities in General.

A judge shall conduct all of the judge's extra-judicial activities so that they do not:

(1) cast reasonable doubt on the judge's capacity to act impartially as a judge;

(2) demean the judicial office; or

(3) interfere with the proper performance of judicial duties.

B. Avocational Activities.

(1) A judge may write, lecture, and speak on non-legal subjects, and engage in the arts, sports, and other social and recreational activities, if such avocational activities do not detract from the dignity of the judicial office or interfere with the performance of judicial duties and provided the judge is not compensated therefor.

(2) A judge may teach on non-legal subjects provided the judge is not compensated therefor.

C. Civic and Charitable Activities

A judge may participate in civic and charitable activities that do not reflect adversely upon the judge's impartiality or interfere with the performance of judicial duties. A judge may serve as an officer, director, trustee, or non-legal advisor of an education, religious, charitable, fraternal, or civic organization not conducted for the economic or political advantage of its members, subject to the following limitations:

(1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge or will be regularly engaged in adversary proceedings in any court.

(2) A judge shall not solicit funds for any educational, religious, charitable, fraternal, or civic organization, or use or permit the use of the prestige of the judicial office for that purpose, nor may a judge be listed as an officer,directors, or trustee of such an organization in any letters or other documents used in such solicitations. A judge shall not be a speaker or the guest of honor at an organization's fund raising events, but may attend such events and contribute to such organizations.

III. LAW RELATED ACTIVITIES

A. Lecturing, Speaking, Appearances as Panel Member, etc.

1. A judge may speak, lecture, appear as a panel member or moderator of a panel discussion on topics concerning or related to the law, or preside over a mock trial, on appropriate occasions and before appropriate audiences.

   a. In lecturing, speaking and other appearances, a judge may:

      (1) discuss or analyze existing law, its history, and trends but without implication that the judge favors or disfavors the trend;

      (2) describe the workings of the judicial system or a particular court;

      (3) discuss the role of a judge;

(4) inform the audience generally concerning the proofs necessary to make or defend a case in particular areas of litigation.

2. In order to preserve the independence, prestige and impartiality which are indispensable assets in the performance of judicial duty, and to preserve respect for and confidence in the judicial office, a judge in any speaking, lecturing or other appearance, should not:

a. cast any doubt on the judge's capacity to decide impartially any issue pending or likely to come before the court in the future. In particular, a judge should not:

(1) comment on cases or proceedings pending in New Jersey courts except to explain what the issues are;

(2) express an opinion on any pending legislative reform, except as set forth n Guideline IIID1;

(3) discuss the judge's approach toward the resolution of legal issues;

b. clarify, defend or justify any of the judge's decisions or opinions, or reasoning therein even in the absence of an appeal;

c. discuss a legal topic from the point of view of any special interest group;

d. educate or be perceived as educating a special interest group to the disadvantage of any other group;

e. become involved in a political or controversial issue or appear to advocate or be identified with a particular position on a controversial issue.

3. The following criteria should govern a judge's consideration of invitations to lecture, speak or otherwise participate in or attend events:

a. To avoid any impropriety or appearance of impropriety, the judge, in determining whether to accept an invitation, should carefully consider:

(1) the nature of the sponsoring organization, including whatever interest it may represent, and whether the participation may tend to identify the judge with the aim or purpose of the organization;

(2) the nature of the audience;

(3) the purpose of the occasion;

(4) the charge, if any, for admission.

b. A judge should not accept an invitation if the sponsoring organization or group:

(1) frequently appears in court as a litigant;

(2) is charging for admission an amount more than is reasonably necessary to cover the costs of the affair;

(3) is otherwise conducting a fundraising affair.

c. A judge should not accept an invitation if it is likely that:

(1) persons may be seeking to use the prestige of the office to advance the private interest of themselves or others;

(2) the judge's presence at the occasion might convey or permit others to convey the impression that the sponsor or anyone else present is in a special position to influence the judge.

d. A judge may not participate in professional seminars or other events sponsored by a profit-making entity unless the event is a public service and the sponsoring organization is closely related to the legal profession.

B. Teaching

1. Subject to Guidelines IIIA1 and 2 judges may teach law-related courses.

2. A judge should not teach at a law school that is not approved by the American Bar Association without prior approval of the Supreme Court.

3. Because a teaching commitment would be time consuming to a much greater degree than many other law related activities and tends to implicate the prohibition against compensation, before undertaking to teach a judge should notify the Supreme Court and the Assignment or Presiding Judge as listed in Guideline IIE of the commitment:

a. setting forth the institution, the subject matter, the hours and the duration of the assignment;

b. certifying that preparation will not encroach upon or conflict with judicial duties;

c. certifying that the judge will receive no compensation and setting forth the plan, if any, for diverting or allocating to an eleemosynary or other non-profit recipient the money that would otherwise have been paid, which must completely divorce the judge from the creation of the fund or the designation or approval of the recipient and vest the matter in the sole discretion of the school.

C. Writing and Publication

1. In writing, a judge should observe the relevant provisions of Guideline IIIA.

2. There may be no compensation for publication of a judge's writing nor should there be a perception that the judge benefits financially from the work.

3. Because of the prohibition against compensation, judges should not write for commercial publication unless the writing contains a prominently displayed preface or footnote that the author has received no compensation for the work. Further, to avoid a financial windfall to a commercial publisher, there should be a suitable diversion by the publisher to an eleemosynary or other non-profit recipient of the royalties or other compensation which would otherwise have been paid to the author. Such plan of diversion, to be approved by the Supreme Court, shall establish that:

a. the judge will receive no compensation directly or indirectly;

b. the judge will be completely divorced from the creation of the fund or the designation or approval of the recipient. these are to be in the sole discretion of the publisher.

4. Nothing herein is intended to deprive a judge of royalties or compensation for work published before assuming judicial office.

5. The approval of the Supreme Court must be obtained before the writer of a work published prior to assuming office may undertake to update or supplement that work. The submission to the Court must clearly establish:

   a. that the royalty or other payments will be exclusively for the original writing and will not include, even in part, compensation for the updating or supplementation;

   b. any compensation for the updating or supplementation must be diverted to an eleemosynary or non-profit recipient and must fairly reflect the value of the work, otherwise approval will be denied unless the original royalties or other compensation are either discontinued or diverted.

6. Whenever approval of the Supreme Court is required the judge shall submit the details of the plan to the Administrative Director for transmittal to the Supreme Court and the Supreme Court may refer the matter to the Advisory Committee for study and recommendation.

IV. NON-LAW-RELATED ACTIVITIES

A. Avocational Activities

1. Writing, lecturing, speaking; engaging in the arts, sports and other social and recreational activities.

   a. The General Guidelines apply to avocational activities.

   b. Because of the range of permissible activities, judges should be particularly careful:

      1) not to engage in activities that might detract from the dignity of the judicial office or interfere with the performance of judicial duties;

      2) to examine the composition and purposes of any organization, group or club before joining, speaking to or otherwise becoming associated with it, in order to avoid any appearance of bias or association with bodies or groups having clear interests in litigation instate or federal courts;

      3) to avoid unnecessary public controversy, or involvement in political matters.

   c. Judges should not allow social relations or friendships to influence or appear to influence their judicial conduct.

   d. With respect to writing for commercial publication Guideline IIIC is applicable.

2. Teaching non-legal subject.

   a. In addition to observing the General Guidelines, and subject to the

relevant provisions of Guidelines IIIA1 and 2 judges may teach non-legal subjects.

b. In teaching non-legal subjects judges should be particularly careful to avoid entanglement in controversial issues which might detract from the dignity of the judicial office or embroil the judge in issues of a political nature.

c. As in the case of law-related teaching, the judge should notify the Supreme Court, and the Assignment or Presiding Judge in accordance with Guideline IIIB3.

B. Civic and Charitable Activities

1. Subject to the general guidelines, judges are encouraged to participate in educational, religious, charitable, fraternal, or civic organizations not conducted for the economic or political advantage of their members.

2. Judges may serve as officers, trustees, or non-legal advisors of such organizations unless the duties would include investment or supervising the investment of funds.

3. Judges should refrain from joining organizations or groups which:

   a. are regular or likely litigants in New Jersey courts, or otherwise resort to the New Jersey courts in support of their stated goal;

   b. represent one side in any current political or legal issue of prominence;

   c. actively pursue specific controversial issues of local,

state, national or international importance;

d. are composed of members selected by a sponsoring organization and are not broadly representative;

e. are committed to the analysis of or action on social, economic, political or other major public issues.

4. The holding of office in neighborhood, community, condominium or homeowners associations, or active participation on behalf of such organizations, carries a potential for political involvement or public controversy and should be avoided.

C. Attending Events

1. A judge should avoid lending the prestige of the office to advance the private interests of others and should avoid conveying or permitting others to convey the impression that they are in a special position to influence the judge.

2. Before accepting any invitation a judge should carefully consider, in the light of Canon 7, whether:

a. the judge's presence might appear to advance some political, commercial or other interest of the host or of another;

b. the event is to honor an active political figure;

c. the event is one which may be or is customarily attended by politicians.

D. Organizations Practicing Invidious Discrimination

1. It is inappropriate for a judge to hold membership in any organization that

practices invidious discrimination on the basis of race, sex, religion or national origin.

2. Organizations dedicated to the preservation of religious, spiritual, charitable, civic or cultural values, which do not stigmatize any excluded persons as inferior and therefore unworthy of membership are not considered to discriminate invidiously.

RULE 2:15. ADVISORY COMMITTEE ON JUDICIAL CONDUCT

2:15-1. Establishment of Committee

In order to implement N.J.S. 2A:1B-10, providing for suspension prior to hearing, and to assist otherwise in fulfilling the administrative responsibilities of the Court, there is established a committee of this Court to be known a Advisory Committee on Judicial Conduct.

Note: Adopted July 23, 1974, effective immediately.

2:15-2. Appointment and Membership

The Committee shall consist of nine members. The Court shall designate one member to serve a Chair and another member to serve as Vice Chair. At least two members shall be retired Justices or Judges of the Supreme Court or Superior Court, not less than three members shall be members of the Bar, and not more than four members shall be laymen who do not hold public office of any nature. The members shall be appointed by the Supreme Court for terms of two years and may be reappointed for such additional term or terms as the Court shall determine. Membership on the Committee shall terminate if a member is appointed or elected to public office or to any position considered by the Court to be incompatible with such service. All appointments to fill vacancies shall be for the unexpired term.

Note: Adopted July 23, 1974, effective immediately; amended July 2, 1984, effective immediately; amended June 28, 1996 to be effective September 1, 1996.

2:15-3. Quorum and Hearing Panels

(a) A quorum shall consist of five members of the Committee. No action of the Committee shall be valid unless concurred in by a majority of its membership; provided, however, that if the Committee finds sufficient cause therefor, and recommends to the Supreme Court the institution of formal proceedings which may lead to censure, suspension, or removal of a Judge, such recommendation shall be made only on the affirmative vote of five members of the Committee who have considered the record and at least three members of the Committee who have considered the record and at lest three of whom were present at any hearing at which oral testimony was produced.

(b) Whenever in the judgment of the Committee it shall appear necessary or expedient to do so, the Chair of the Committee may establish and designate three member panels to conduct any investigation or any hearing contemplated by these rules. At the conclusion thereof such panel shall make a report or recommendation to the Committee, which shall review the report or recommendation and act thereon as set forth in (a) of the Rule.

Note: Adopted July 23, 1974, effective immediately; paragraph (b) amended June 28, 1996 to be effective September 1, 1996.

2:15-4. Administration and Principal Office

(a) The Administrative Director of the Courts shall be Executive Secretary of the Committee, and the principal office of the Committee shall be located at the Richard J. Hughes Justice Complex, Trenton, New Jersey.

(b) The Committee shall be provided by the Administrative Director with such investigatory and secretarial assistance as may be needed to perform its functions.

(c) All records of the Committee shall be filed and maintained in such principal office of the Committee. All papers filed wit and proceedings before the Committee shall be confidential unless and until the Committee files with the Supreme Court a recommendation for the filing of a complaint under N.J.S. 2A:1B-3, and the Court orders issuance of such complaint.

Note: Adopted July 23, 1974, effective immediately; paragraph (a) amended July 26, 1984 to be effective September 10, 1984.

2:15-5. Reimbursement

The Committee members shall serve without compensation, except that they shall be allowed their expenses for travel or other incidental expenses necessarily incurred in the performance of their services.

Note: Adopted July 23, 1974, effective immediately.

2:15-6. Investigations; Service of Subpoenas and Orders

(a) In the conduct of investigations and hearing proceedings of any nature, the Committee, Secretary to the Committee or individual members thereof may (1) administer oaths, (2) order and otherwise provide for the inspection of books and records, (3) take depositions of necessary witnesses on application for and approval by the Supreme Court, (4) issue subpoenas for the attendance of witnesses and the production of papers, books, accounts, documents and testimony relevant to any such investigation or formal proceeding.

(b) The Sheriff of the appropriate County or such person as may be designated by the Committee, shall, when necessary in the judgment of the Committee, serve subpoenas or orders for the taking of depositions upon the persons involved.

Note: Adopted July 23, 1974, effective immediately; paragraph (a) amended July 22, 1983 to be effective September 12, 1983.

2:15-7. Cooperation by Court Personnel

Officials, attaches, clerks and employees of the Courts of the State shall cooperate with and give reasonable assistance and information to the Committee and any authorized representative thereof, in connection with any investigations or proceedings within the jurisdiction of the Committee.

Note: Adopted July 23, 1974, effective immediately.

2:15-8. Complaints; Preliminary Investigation

(a) The Committee, upon receiving a written statement or criticism or complaint, not obviously unfounded or frivolous, or relating to a matter solely subject to an appeal from the criticized conduct or action, alleging facts indicating that a judge of the Superior Court, Surrogate's Court, Tax Court or Municipal Court is guilty of:

(1) misconduct in office,

(2) willful failure to perform judicial duties,

(3) incompetence,

(4) habitual intemperance,

(5) engagement in partisan politics,

(6) conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or,

(7) may be suffering from a mental or physical disability which is disabling the judge and may continue to disable the judge indefinitely or permanently from the performance of judicial duties,

shall make a preliminary investigation to determine what, if any, action should be taken therein. On referral to the Committee by the Supreme Court, the Committee shall make such investigation concerning any Justice of the Supreme Court and proceed thereafter in accordance with this rule subject to the terms of the referral.

(b) The Committee may make such a preliminary investigation of any Judge referred to in (a) hereof on its own motion without receiving such a statement, criticism or complaint.

(c) If the preliminary investigation does not disclose sufficient cause to warrant further proceedings, the person submitting the statement, criticism or complaint shall be so notified. If the judge involved is aware of the statement, criticism or complaint, the judge should be notified of the Committee's finding and action.

Note: Adopted July 23, 1974, effective immediately; paragraph (a) amended July 15, 1982 to be effective September 13, 1982; paragraph (a) amended July 26, 1984 to be effective September 10, 1984; paragraphs (a)(2), (a)(7) and (c) amended July 18, 1990 to be effective September 4, 1990.

2:15-9. Discretion as to Disclosure to Judge

If the Judge has not been made aware of the statement, criticism or complaint, the Committee in the exercise of its discretion in the particular circumstances may furnish to or withhold the information from the Judge as to the action taken.

Note: Adopted July 23, 1974, effective immediately; amended July 13, 1994 to be effective September 1, 1994.

2:15-10. Further Inquire; Notice to Judge

Whenever the preliminary investigation indicates the desirability of further inquiry into the matter, the Committee shall:

(a) unless the circumstances render it unnecessary, require the complainant to file a verified complaint against the Judge;

(b) notify the Judge of the nature of the charge, the name of the person making it, and that the Judge has the opportunity to p resent within such reasonable time as the Committee shall fix, such matters as the Judge may choose with respect to it, including, on the Judge's request, the right to appear before the Committee, on notice to the complaining party, and to make such statement under oath as the Judge deems appropriate. If the Judge does make a statement before the Committee, on request, the complainant shall be permitted to make further

statement as the complainant deems material. Such statements shall be taken stenographically or by a sound recording device.

(c) The notice of the Judge referred to in (b) hereof shall specify the charges in ordinary and concise language and the alleged facts upon which the charges are based.

Note: Adopted July 23, 1974, effective immediately; paragraphs (b) and (c) amended July 13, 1994 to be effective September 1, 1994.

2:15-11. Dismissal of Charges; Informal Conference

Upon completion of the preliminary investigation, the Committee may:

(a) if it finds that the charges are without merit, dismiss them and notify the parties of the action taken. If the matter has been made public, the Committee may at the request of the Judge involved, issue a short statement of clarification and correction;

(b) if a Judge is publicly charged with having engaged in grievous reprehensible conduct or having committed a serious offense, and after the preliminary investigation it is decided that there is no basis for further proceedings or recommendation respecting the issuance of a formal complaint, the Committee may issue a short explanatory statement;

(c) if the investigation reveals some departures by the Judge from common standards of judicial propriety, such as discourtesy, rudeness, disparagement of witnesses or attorneys and the like, or other conduct or demeanor which would reflect unfavorably upon the administration of justice if persisted in or were to become habitual or more substantial in character, the Committee may request the Judge to appear at a time and place designated for an informal discussion of the matter. After making the Judge aware of the objectionable conduct, and becoming satisfied that it was temporary in nature and not likely to become habitual, the Committee may dismiss the complaint, and advise the parties of the action taken, and the reasons therefor.

(d) Any such conference shall be recorded by a qualified reporter or by a sound recording device

and a transcribed record thereof filed with all the papers in the proceeding in the principal office of the Committee.

Note: Adopted July 23, 1974, effective immediately; paragraph (e) deleted and caption amended July 22, 1983 to be effective September 12, 1983; paragraph (c) amended July 13, 1994 to be effective September 1, 1994.

2:15-12. Recommendation of Formal Proceedings

Whenever the Committee concludes from the preliminary investigation that the circumstances, if established at a plenary hearing, may call for censure, suspension or removal of the Judge, and that formal proceedings to that end should be instituted, the Committee shall promptly file a copy of the recommendation and the record of the Committee certified as such by its Secretary with the Clerk of the Supreme Court. The Committee shall issue without delay and serve upon the Judge a notice advising that it a filed such a recommendation with the Supreme Court. Such notice shall be entitled:

"Before the Advisory Committee on Judicial Conduct.

Inquiry Concerning a Judge,No.."

and proof of such service shall be filed with the Clerk of the Supreme Court.

Note: Adopted July 23, 1974, effective immediately; amended July 22, 1983 to be effective September 12, 1983; amended July 13, 1994 to be effective September 1, 1994.

2:15-13. Motion by Judge

Within 15 days of the receipt of such notice, the Judge may move in writing before the Supreme Court upon 15 days notice to the Committee and to the Attorney General or other person specially designated by the Supreme Court under Rule hereof, for an order denying or rejecting the recommendation for institution of formal proceedings.

Note: Adopted July 23, 1974, effective immediately; amended July 24 1978 to be effective September 11, 1978; amended July 13, 1994 to be effective September 1, 1994.

2:15-14. Issuance of Order

Upon receipt and review of a presentment from the Committee recommending removal, the Court may issue or order issued the appropriate complaint, and the matter shall proceed in accordance with R. 2:14. In matters with presentments recommending a sanction less than removal, the Court may issue or order issued a formal complaint pursuant to R. 2:14 or may order the respondent to show cause why a sanction less than removal should not be imposed. If, in a matter in which the Committee has recommended removal, the Court does not agree that removal is called for, it may order the respondent to show cause why a sanction less than removal should not be imposed.

Note: Adopted July 23, 1974, effective immediately, amended July 22, 1983 to be effective September 12, 1983.

2:15-15. Prosecution by Attorney General or Designated Attorney

All phases of the proceedings in the Supreme Court shall be prosecuted by the Attorney General or the Attorney General's representative unless the Court shall specially designate an attorney for the purpose. (N.J.S. 2A:1B-4)

Note: Adopted July 23, 1974, effective immediately; amended July 13, 1994 to be effective September 1, 1994.

2:15-16. Record and Papers of Committee to be Privileged

The filing of papers with or the giving of testimony before the Committee or before the Supreme Court, if a formal complaint is issued, shall be privileged in any action for defamation. No other publication of such papers or proceedings shall be so

privileged, except that the record filed by the Committee in the Supreme Court continues to be privileged.

Note: Adopted July 23, 1974, effective immediately.

2:15-17. No Costs

No ward of costs shall be made in any proceeding before the Committee or the Supreme Court, unless specially ordered by the Supreme Court for good cause shown.

Note: Adopted July 23, 1974, effective immediately.

2:15-18. Effect of Resignation

If a judge resigns from office while a complaint is pending before the Committee, the Committee, in its discretion, may (a) conclude the matter in accordance with these rules, (b) submit the complaint and other relevant information disclosed to the appropriate District Ethics Committee for its review, investigation and determination pursuant to R. 1:20-1 et seq., or (c) do both.

Note: Adopted July 16, 1981, to be effective September 14, 1981; amended July 13, 1994 to be effective September 1, 1994.

2:15-19. Challenges to the Proceedings

Constitutional challenges to the proceedings shall be raised in response to notice received under R. 2:15-9, R. 2:15-10 or R. 2:15-11. They shall be preserved pending Supreme Court review of the matter on the merits.

Interlocutory relief may be had only to prevent irreparable injury. Motion papers shall conform to R. 2:8-1. If leave to appeal is granted, the record below may, in the discretion of the Court, be supplemented by the filing of briefs and oral argument.

Note: Adopted July 16, 1981 to be effective September 14, 1981.

2:15-20. Confidentiality

The record before the Committee shall be confidential and shall not be available to any person except in the proper discharge of official duties, provided however that the Committee and its designated staff personnel shall have access to it in the performance of their duties, and provided further that, if a Judge who is the subject of a complaint requests it, the charge, the proceeding of the Committee thereon, and the action of the Committee with respect to the charge, shall be made public.

Upon the issuance of a complaint for removal or an order to show cause, the presentment of the Committee, together with any briefs filed pursuant to an order of the Court, shall be made public. The entire record in such a matter shall, unless the Court otherwise directs, be made public upon the entry of a final order imposing discipline.

Note: Adopted July 22, 1983 to be effective September 12, 1983; amended July 13, 1994 to be effective September 1, 1994.

SUPREME COURT OF NEW JERSEY
DOCKET NO.

	Administrative Action
	PETITION FOR REVIEW
In Re: THE INQUIRY OF EVAN W. BROADBELT J.M.C.	
	Sat Below: Supreme Court Committee on Extrajudicial Activities
	Opinion #13-95

PETITIONER'S LETTER BRIEF IN SUPPORT OF PETITION FOR REVIEW

EVAN W. BROADBELT, J.M.C.
P. O. Box 648
Allenwood, NJ 08720
(908)528-8424
Petitioner

EVAN W. BROADBELT, J.M.C.
On the brief

Dated: June 15, 1995

Honorable Justices:

Pursuant to R.2:6-2(b) and R.2:6-4(a), please accept this letter brief in lieu of a more formal brief in support of Petition for Review.

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STATEMENT OF MATTER INVOLVED

The matter involved in this petition is the application of Canons 2B, 3 and 4 of the Code of Judicial Conduct and the First Amendment to the Constitution of the United States to the appearance of a part-time Municipal Court judge as a guest commentator on Court TV, Rivera Live, and similar television programs to provide commentary on trials of matters in New Jersey and other jurisdictions.

QUESTION PRESENTED

May a part-time Municipal Court judge appear as a guest commentator on Court TV or similar programs to provide commentary to the public regarding the criminal justice system and trials outside of New Jersey, such as California v. Simpson?

ERRORS COMPLAINED OF

1. The Committee's Opinion #13-95 sets forth no authority under the Canons of Judicial Conduct for its decision..

2. The Committee's Opinion #13-95, the result of a telephone poll without a formal meeting, denied Petitioner due process of law.

3. There is no credible authority for the Committee's Opinion #13-95.

STATEMENT OF FACTS

I have been a Municipal Court Judge since 1982 and am presently serving as a Municipal Court Judge in four municipalities in Monmouth County and one in Ocean County. I served as an Assistant Monmouth County Prosecutor for two years, a Municipal Prosecutor in two municipalities, the Secretary of the District IX Ethics Committee for 10 years, and for the past five years have been a member of the Supreme Court Committee on Municipal Courts.

Since September, 1992, I have served as a guest commentator, without compensation, on Court TV, and have appeared in excess of 50 times to provide commentary on criminal trials in various jurisdictions, in accordance with the provisions of Canon 4 of the Code of Judicial Conduct and the guidelines for guest commentators for Court TV, a copy of which is attached.

Since November, 1994, I have appeared on the "Rivera Live" program on CNBC on three occasions, again in accordance with the provisions of Canon 4, to provide guest commentary on the matter of California v. Simpson. These appearances, also, are without compensation.

On December 8, 1994, I appeared on a local cable television program, Legal Line, hosted by Robert Abrams, Esquire, to discuss the jurisdiction and procedures of the municipal courts, generally. I was contacted by Hon. Lawrence M. Lawson, A.J.S.C. and advised that I was required to obtain prior approval before making such an appearance. The matter was discussed, and thereafter, Judge Lawson issued the attached memorandum, ,which indicated to me that he agreed with my position that prior approval was not required but that he requested prior notification of any future appearances. Thereafter, I followed that memorandum prior to making any further appearances.

On March 20, 1995, after prior telephone advice, I received the attached letter from Judge Lawson. I was surprised that Judge Lawson had to "vitiate" his prior approval and request that I refrain from appearing on the television programs since I have been doing so for the past two and one half years, and in fact, judges from other jurisdictions have also appeared on numerous occasions.

I am complying with that request and have, in fact, declined three invitations to appear as a result.

On March 22, 1995, I was advised by Judge Lawson by telephone that the Advisory committee on Extrajudicial Activities had considered his letter of March 20, 1995, and my letter and exhibits dated March 20, 1995, and had agreed with Judge Lawson's position on the issue.

I telephoned Nancy R. Lichtenstein, Esquire, at the suggestion of Judge Lawson, to inquire as to the basis of the decision of the Committee, and Ms. Lichtenstein advised me that the Committee had not received a copy of y letter and attachments but had determined that the appearances violated the provisions of Canon 3A(8).

I submitted this inquiry for complete review of the issues by the Committee, which resulted in Opinion #13-95.

ARGUMENT IN SUPPORT OF PETITION

POINT I

CANON 3 OF THE CODE OF JUDICIAL CONDUCT APPLIES TO JUDICIAL CONDUCT BY A JUDGE IN PERFORMING THE DUTIES OF JUDICIAL OFFICE.

The relevant Canon of the Code of Judicial Conduct to be reviewed for this inquiry is Canon 3. Specifically in question is the provision contained in Canon 3A(8), as follows:

> **"Canon 3. A Judge Should Perform the Duties of Judicial Office Impartially and Diligently**
>
> The judicial duties of a judge take precedence over all other activities. Judicial duties include all the duties of the office prescribed by law. In the performance of these duties, the following standards apply:
>
> A. Adjudicative Responsibilities.
>
> (8) A judge should abstain from public comment about a pending or impending proceeding in any court and should require similar abstention on the part of court personnel subject to the judge's direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. ..."

Judge Lawson and the Committee, apparently, have interpreted this provision to apply to public comments about any case in any court in New Jersey or anywhere else in the United States.

Canon 3 is divided into two separate sections. They are A. Adjudicative Responsibilities and B. Administrative Responsibilities.

The 10 subparagraphs in section A. all speak to the conduct of a judge in relation to the performance of the judicial duties of the office, not quasi-judicial or extra-judicial activities. Subparagraph (8) is part and parcel of the description of the manner in which a judge must perform judicial duties, which are "all the duties of the office prescribed by law."

That Canon is clearly intended to address the conduct of the judge in the court where the judge presides.

An appearance as a panel member to discuss legal issues, the process and procedure of a trial, whether or not that discussion is televised, is not included in the definition of "judicial duties" as defined in Canon 3.

Such an appearance is a quasi-judicial and extra-judicial activity. As such, it is clearly

governed by the provisions, and restrictions, of Canon 4, and not Canon 3, unless the judge is presiding or will be presiding in that trial.

POINT II

GUEST COMMENTARY ON COURT TV IS A QUASI-JUDICIAL ACTIVITY GOVERNED BY THE PROVISIONS OF CANON 4.

The controlling Canon on the issue is Canon 4,, which permits law related activities, subject to the specific limitations set forth in that Canon, as follows:

> **"Canon 4 A Judge May Engage in Activities to Improve the Legal System, and the Administration of Justice**
>
> A judge, subject to the proper performance of judicial duties, may engage in the following quasi-judicial activities if in doing o the judge does not cast doubt on the judge's capacity to decide impartially any issue that may come before the court and provided the judge is not compensated therefor.
>
> A. A judge may speak, write, lecture and participate in other activities concerning the law, the legal system, and the administration of justice...."

The report of the Supreme Court Committee on Extrajudicial Activities (Abridged) states:

> "...Since Canon 4, which deals with quasi-judicial activities to improve the law, the legal system and the administration of justice, is

> essentially permissive, the focal point was not the activity itself in most instances; rather, it was the restrictions or limitations most appropriate for each...." (emphasis supplied) page 15.

Indeed, a majority of the Committee determined that prior approval was not required for these activities, as stated in the Committee Report:

> "...Significantly, the Code does not require prior approval of any of the activities in question except teaching....." page 17.

The activity involved in this inquiry clearly is not a judicial duty as defined in Canon 3. It is a quasi-judicial activity which is subject to the provisions of Canon 4.

The Committee recognized that distinction in the Report:

> "...To the extent that the Code permits, and in many cases encourages, extrajudicial activities, prior approval is unwarranted unless specifically required by the Code, Court Rules or administrative directives. To seek permission to do that which is already permitted without prior approval is redundant.
>
> By consulting the Code and applying the guidelines, judges should be

> able to resolve the propriety of the contemplated activity and to heed such limitations as may be placed upon the activity itself without further assistance...." page 15.

The relevant Guideline in issue is Guideline III. LAW RELATED ACTIVITIES. Those activities are permitted, without prior approval, subject to the specific limitations on the content of the commentary. More specifically, the Guideline provides in IIIA.5a.:

> "... a judge shall not:
> a. comment on cases or proceedings pending in New Jersey courts except to explain what the issues are;..."

Clearly the Guidelines do not embrace the interpretation of a ban on all comment on cases pending throughout the United States, nor for that matter do they completely prohibit comments on matters pending in New Jersey.

POINT III

CANON 2B OF THE CODE OF JUDICIAL CONDUCT DOES NOT PROHIBIT THE ACTIVITY.

In his letter of March 20, 1995, Judge Lawson expressed his opinion that the activity is prohibited by the provisions of Canon 2B.

Specifically, it was his opinion that my appearance as a guest commentator "advances commercial Television" and therefore violates the proscription that "...A judge should not lend the prestige of office to advance the private interest of others;...".

The first issue is, therefore, whether a public speaking appearance by a judge, for which the audience is not charged a fee, to speak about the judicial process within the framework of Canon 4 and the Guidelines thereunder, constitutes the lending of the prestige of office.

At the most basic level, a judge, when interacting with the public in any extrajudicial activity, carries with him the prestige of office. Unless we are prepared to determine that a judge should speak only from the bench, then the issue is not whether a judge may speak publicly, but rather,

whether a judge in speaking, complies with restrictions imposed by Canon 4.

There should at this time be no question that the clear policy of this Court has been to expand the activities of judges beyond their official duties to encourage greater involvement with society and demystify the role of courts in our society.

As recently as January 30, 1995, this Court approved amendments to the Guidelines for Extrajudicial Activities specifically Guideline III. Law-related Activities, to provide:

> "...judges are encouraged to accept invitations to speak, lecture, appear as a panel member or moderator of a panel discussion on topics related to the law..." III.A.1.

When a judge appears in such a capacity, having been encouraged to do so, without compensation, with no cost to the audience, it defies logic to suggest that such activity lends the prestige of office, unless the Court is prepared to apply a similar prohibition to all public speaking by judges, such as lecturing at an educational institution, at a Law Day ceremony, at a continuing legal education seminar or at the local Kiwanis Club meeting.

The second question is whether such an appearance "advances the private interest of others." Judge Lawson apparently is of the opinion that because the Courtroom Television Network and CNBC are commercial businesses, that a judge may not appear to provide commentary which Canon 4 permits and which the Guidelines for Law Related Activities specifically encourages.

Guideline III. B. specifically permits judges to teach, without compensation, at law schools and other institutions. It also provides for the method to disburse any money which would be received for such activity. Law Schools are commercial institutions; continuing legal education programs may or may not be non-profit, yet fees are charged for admission and salaries are paid to employees.

In fact, under Judge Lawson's interpretation, his own previous appearance a Assignment Judge on Cablevision of Monmouth would be a violation, since that is a commercial enterprise.

Taken to its logical conclusion, to prohibit the appearance of a judge as a commentator because it would advance commercial Television would require a prohibition of any judge appearing while presiding

over a trial which is covered by Court TV. Court TV exists because this Court, and other State Courts have determined that it is beneficial to society and the Court to have televised court proceedings. But for that invitation, Court TV would not exist. By authorizing the broadcast of court proceedings, under Judge Lawson's analysis, this Court is advancing the private interest of Court TV.

Is it the rule, then, that judges may impart their knowledge and the benefit of their experience to law students paying tuition, but that that knowledge and experience may not be shared with television viewers who pay no tuition?

It is submitted that, even without consideration of basic implications of First Amendment issues, the issue here is not whether a judge may speak and provide commentary, but rather the manner in which such commentary may be provided. It is respectfully submitted that Guideline III provides that mechanism, and that there cannot, should not, and must not be a prohibition as envisioned by Judge Lawson.

POINT IV

THE ACTION BY JUDGE LAWSON AND THE COMMITTEE ON EXTRAJUDICIAL ACTIVITIES VIOLATES PETITIONER'S FIRST AMENDMENT RIGHT TO FREE SPEECH (NOT PRESENTED BELOW).

The petitioner submits that the interpretations of the Canons of Judicial Conduct by Judge Lawson, and, presumably the Committee on Extrajudicial Activities, is in contravention of the First Amendment of the Constitution of the United States and Article I paragraph 6 of the New Jersey Constitution.

While there are limitations placed upon public speaking by judges which is necessary to uphold the integrity of the judiciary, the United States Supreme Court has long recognized that "...public employees do not shed constitutional protection when they enter the workplace..." Scott v. Flowers, 910 F.2d 201, 210 (5th Cir. 1990).

The test, as set forth in Pickering v. Board of Educ. 391 U.S.. 563, 88 S. Ct. 1731, 20 L.Ed. 2d 811 (1968), is a two step inquiry. First, the Court must determine whether the speech in question addresses "a matter of public concern." Picker, 391 U.S. at 571, 88 S.Ct. at 1736. The appearance as a guest

commentator on trials which are in other jurisdictions clearly are not petitioner's private concern, but are indeed relating to matters of public concern. Petitioner is not unlike the justice of the peace in Scott v. Flowers, supra. there the Court of Appeals for the 5th Circuit concluded that an open letter written by a justice of the peace to county officials and circulated to the local newspaper "airing his views on the administration of the Fort Bend County justice system" was protected by the First Amendment. Scott, 910 F.2d. at 211. The court held that Scott "was speaking not as an employee about matters of merely private interest, but rather as an informed citizen regarding a matter of great public concern." quoting Moore v. City of Kilgore, 877 F.2d 364 (5th Cir.) cert. denied ___ U.S. ___, 110 S. Ct. 562, 107 L.Ed. 2d 557 (1989) at 371.

The second issue is whether, under the circumstances of the case, "the right to speak is outweighed by the state's asserted interest in promoting the efficiency and impartiality of its judicial system." Scott, 910 F.2d at 211.

As in Scott, the burden in this matter is upon the Committee and the Court to establish that the

interest in protecting the efficiency and impartiality of the state judicial system outweighs petitioner's first amendment rights.

The United States Supreme Court "has frequently reaffirmed that speech on public issues occupies the 'highest rung on the hierarchy of First Amendment values' and is entitled to special protection" Connick v. Myers 461 U.S. 138, 03 S. Ct. 1684 at 1689, 75 L. Ed. 2d 708 (1983), quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913, 102 S.Ct. 3409, 3425, 73 L. Ed. 2d 1215.

It is submitted, therefore, that not only may a judge not be reprimanded for exercising first amendment rights on matters of public concern, made within the context of the provisions of Canon 4 of the Code of Judicial Conduct and the guidelines thereunder, but that there cannot be a chilling effect imposed upon a judge so speaking, provided the judge limits his comments to the guidelines.

COLORADO v. DAVIS & HARRINGTON: Trial in Denver, Colorado of two men charged with murder and kidnapping. (Aired June 8, 1994)

0:06 - 3:38

ANCHOR: Welcome back to the final stages of a trial in Denver of two young men who are accused of murder, kidnapping, and other serious offenses. Judge paul Markson is in what we call the housekeeping or the boilerplate stage of this instructions, in which he is reading off definitions of such words as "thing of value". And I've got to say, there must be glazed eyes throughout the jury at this point.

BROADBELT: I think at that time, Fred, what we are doing and what he is doing now is just giving them that information for the record to complete the record in the event that there is a conviction and an appeal.

ANCHOR: OK. Now, we haven't heard very often a judge read off the numbers of the instructions. He is just about number 29 or 30 now. Why is he doing that?

BROADBELT: Well, I can think of one or two reasons. Either, one, he is doing it for the record so that there is a complete record on the transcript of exactly which instruction he was reading and where. And secondly, there is the possibility -- although I don't know if they do it in Colorado -- is to give the instructions to the jurors in the jury room so they have them in front of them.

ANCHOR: Now, I was very much struck when he got to that instruction. We've heard throughout the trial -- he has stopped the proceedings whenever any mention was made of the fact that these two young men allegedly were members of a gang -- street gang -- and he tells the jury in the same words that the evidence that they were

members of the gang is simply to help -- that's to go toward their identification -- they were wearing, there was a tatoo, there was a "gang" look. And he says, you shall not take this as any implication that they are bad people and that they have done this, which, of course, reminds the jurors every time that these are gang members and they may be pretty tough hombres.

BROADBELT: That's true. That's the reverse of the coin. Obviously, for purposes of the record, they want to do that so that there can never be a question that the jury used it for anything other than identification and not to assume that they are bad people because they are the members of a gang.

ANCHOR: Now, I am told that what has happened is that he has stopped reading and the attorneys have approached the bench. And I would suspect that maybe what the judge is doing is saying, "now did I misspeak anywhere, have I forgotten anything, is there anything that you want to add or modify" -- in order to get the record absolutely straight before they start arguing.

BROADBELT: Fred, that's what they do. When he completes it, he calls the attorneys up -- "are there any objections to anything I said, did I leave anything out, was there an element that I missed that should be in here, or do you have any supplemental instructions that you thought of while I have been giving those that you think should be addressed as well?"

ANCHOR: Now then -- what is the argument? In New Jersey --you are a judge in New Jersey -- do you send the instructions, copies back with the jurors?

BROADBELT: The jury instructions in New Jersey do not go to the jury. They can be read back to

them at any time, and they are instructed that if they have any questions about the law, they can come back to the courtroom and have them read to them again.

ANCHOR: Now are they permitted to take notes in your courtroom?

BROADBELT: Well, I don't have juries in my courtroom.

ANCHOR: Well, alright, but in your state?

BROADBELT: Generally speaking, it's on a very limited basis.

ANCHOR: Well then, what's the rationale for not giving them copies? Nobody can remember what we just heard. It took him 40 minutes to read that.

BROADBELT: I think the trend now is to give them more of that information. If you notice, as he was reading it, it's what we call plain language. There's nothing -- there is not a lot of the legal jargon that used to be there many years ago. It's very plain language and easily understandable and easily readable. I think the fear is that jurors will tend to focus too much on one word or two words in a particular charge and not see the overall picture, and that's the concern.

ANCHOR: Well, what's happened is that after this discussion up at the bench, Judge Markson is indeed delivering further instructions. We'll listen.

(Source: June 8, 1994 / Tape 3 / 13:01 - 16:34)

MISSOURI v. NEELEY: Murder trial of man who confessed to killing his daughter's alleged rapist and pled temporary insanity defense. (Aired November 30, 1994)

3:46 - 6:35

ANCHOR: We have been watching PhD. Richard Gowdy, who has been testifying for the prosecution. Evan, I want to ask you, he says, "well, the defendant recalled these details. He recalled them as you and I would, so that means he wasn't suffering from a mental disease or defect." But, does one necessarily follow the other?

BROADBELT: Well, not necessarily, but in his analysis what he wa comparing was the initial statement to the police, the taped interview on the television station, and then his interview with the defendant some six months later. And what he found was that in all circumstances of significant details, they were identical. That means generally to him, in his field, that you would expect if somebody was suffering from a mental disease or defect there would be a lack of memory on certain significant details, and they wouldn't necessarily be all consistent. They would be inconsistent statements all over the lot so he would be confused and uncertain of what happened. And what he is saying here is, he is clearly conscious and aware of what happened and what he did and what was going on at the time of the killing, and he consistently said it over a period of time to three different people, and it didn't change.

ANCHOR: You know, many defense lawyers feel that if they are going to try a case with an insanity defense that they are far better off trying it to a judge rather than a jury, feeling that jurors think that the insanity defense is some kind of technicality, and that they really don't

trust juries on that issue. Do you think that's fair? Would you like to be faced with that decision in an insanity case?

BROADBELT: Well, I think, Rikki, there is a lot to be said for a bench trial on the issue of insanity when you have experts who are dealing with specific issues. The difficulty here with this cross-examination on the rebuttal of this doctor was that he took the opportunity just to give a lecture to the jury. If you notice, he turned every time he was asked a question. He wasn't looking at the defense attorney. He was looking right at the jury, and it really didn't matter what the question was he was being asked. He was giving his speech of his opinion that there was no mental disease or defect, and that hurts the defense.

ANCHOR: Well, experts in this situation -- this is a doctor who is basically hired by the State to go examine the defendant. These witnesses testify all the time, right? So, they tend to be very, very good.

BROADBELT: Absolutely, and when you have a witness who clearly is, as this doctor was, very comfortable on the witness chair, the job of the attorney on cross-examination is to make him uncomfortable on the witness chair, and not allow him to use that chair as his opportunity to lecture the jury, to give the jury his full opinion, but rather go to specific areas of his report -- if you can -- and try to attack his credibility on specific issues and not let him go into a long, complicated explanation every time you ask him a question.

(Source: November 30, 1994/Tape 2/16:58 - 19:48)

6:41 - 8:52

ANCHOR: I want to ask you Evan, one of the key charges here, of course, is second-degree murder, and one part of that charge is the doctrine of felony murder. And, what Prosecutor Callahan is doing in looking at the law is saying that if the underlying felony is holding onto this unlawful weapon, that that's enough to bring it to felony murder. But, traditionally, as you and I know, felony murder meant something completely different. It meant the robbery or the rape, and somehow a felony occurred. Can you justify this reading of the statute?

BROADBELT: Well, Rikki, it's a very creative effort by Mr. Callahan to add this as a second opportunity at the second degree conviction. But, by using the unlawful use of the weapon, although it seems to be part and parcel of the same offense and all one offense, if you look at the statute, clearly if you first exhibit a weapon, then do it in a threatening or angry manner in the presence of one or more other persons, and the weapon is capable of being fired, that's an offense whether anybody is injured or not -- in and of itself -- and that's a felony. If the weapon were to go off, it doesn't necessarily mean that if it just kills the intended victim that it applies as felony murder, but if the innocent passerby is struck when the weapon goes off accidently, while it's being brandished, if you will, and waved around, that would justify a conviction for felony murder of that unintended victim.

ANCHOR: Well, the unintended victim though is much closer to the traditional doctrine of felony robbery, felony rape than murder -- than the way that it was used in this case.

BROADBELT: Oh, absolutely and I'm certain that the defense is not very happy that this is

being charged as an additional second degree murder count. But, in point of fact, that is a separate statutory offense in the state, and clearly you can be convicted of that offense without discharging the weapon. And if you do discharge the weapon and it causes the death of someone, then you have committed that felony first, and thereafter you've committed the murder in conjunction with that felony. So, creative pleading by the prosecutor.

ANCHOR: And, creative pleading, and, if I were a prosecutor, I suppose I'd like to do that too. Evan, thanks so much as always for being here. It's always great to have you.

(Source: November 30, 1994/Tape 2/54:29 - 56:39)

NEW JERSEY v. BARKLEY: Assault trial in Rutherford, New Jersey of Phoenix Suns basketball star Charles Barkley. (Aired March 9, 1994)

9:00 - 13:43

ANCHOR: Evan, let's talk about this special prosecutor, because we were saying earlier with our last commentator it's very strange, and certainly a biased person who's trying this case for the state of New Jersey in this instance.

BROADBELT: Well, Carol, on first appearance it's strange, but when you evaluate the court rules in New Jersey and the case law in New Jersey, it's not all that strange. The court rules do permit any attorney to appear in the absence of the appropriate prosecutor -- here the municipal prosecutor -- where he declined to participate in the case because the complaint was not signed by a police officer but rather was signed by the civilian complainant. There is a rule that provides that that attorney, Mr. Pianko, may make application to the judge to appear as the prosecutor and prosecute the complaint. He can do that, as he did earlier in this case, with the consent of not only the municipal prosecutor but also of the defense attorney who is representing Charles Barkley. So that is permitted. Now, there are limitations on it, however, because where the problem arises is where the special prosecutor is a person who may have an interest in the case beyond prosecuting it.

ANCHOR: Which is the case here.

BROADBELT: Exactly. Prosecutors have a function not just to represent one side or the other or get a conviction. A prosecutor has a very special function under the rules of professional conduct, and that is to seek

justice. And his obligation is to evaluate all the evidence and make an independent determination whether he should prosecute a case and how he should prosecute a case.

ANCHOR: What do you do now when you have a Mr. Pianko who comes up and says -- he doesn't on the surface appear to have any vested interest in the outcome of all of this -- and he says, "I saw it, and here's what I saw, and it doesn't look like any of the things that we're hearing from the plaintiff."

BROADBELT: That's exactly where it becomes a problem. There have been decisions in the federal district court in New Jersey and in one Law Division court -- which is not a decision that is binding on this particular case because it's in a different county -- where the courts have not held that that rule allowing special prosecutors is unconstitutional, but have held that the courts -- the trial court -- must look at it, evaluate not only who the special prosecutor is but whether he has a financial interest in the outcome of the matter and whether he has a potential conflict of interest because of his representing the civilian complainant in another case. Clearly, here, Mr. Pianko said that he does have a financial interest. He has a contingent fee on the civil case, and there might be a question as to whether he knew of these witnesses, these defense witnesses earlier, that seem to clearly contradict hi client's version of what happened.

ANCHOR: Given the fact that -- let's just say that there was someone else other than Mr.Pianko there, that someone else in that position might have easily said, even at that point, well, let's not go any further. Let's drop it at this stage of the game.

BROADBELT: Well, exactly. The prosecutor has the obligation to present all relevant evidence, including exculpatory or evidence that would help the defendant. And, if he has witnesses, he has the right to stand up in front of the judge and say, "Judge, I'm not going to prosecute this complaint and the reason is because I have this witness, or two witnesses, or three witness who say the allegation made by the complainant is not a valid one."

ANCHOR: Well, now, let's look on the other side. What if then -- the judge, we said earlier, will be deciding this some time today and we've been told before 2 o'clock. Suppose he comes back in and says, I don't see -- I decide that there's no basis for these criminal charges. What happens then with the civil suit that we know is out there and is moving along in its due course?

BROADBELT: Entirely independent of each other, Carol. The criminal case -- the complainant here, Mr. Pianko's client and his witnesses, have to convince this judge beyond a reasonable doubt that this assault took place. If the judge finds that it's not an assault or it's self-defense or that it never happened the way the complainant said it happened, and he finds Charles Barkley not guilty, that does not mean that he may not be liable civilly for an assault and battery in the civil case, because the burden of proof in a civil case is proof by a preponderance of the evidence, not the heavier burden of proof beyond a reasonable doubt.

ANCHOR: Well, the preponderance of the evidence that we're hearing right now, it seems that . . . . With assault you need that specific intent -- I mean, you know -- I intended to do the act, I intended to strike you, or whatever, like this. We

have been hearing conflicting information coming in regarding that.

BROADBELT: Well, the testimony from Mr. Pianko, the cameraman, is not terribly inconsistent with Mr. McKeever's testimony, because Mr. McKeever did say at one time that he stretched his hand out to get a high-five, or get a five from Charles Barkley, which is not inconsistent with Pianko saying that the hand come out, and Barkley reached up to push the hand away, and as he was doing that hit Mr. McKeever in the face. That may not be an intentional assault under the criminal statute, but it may well be an unconsented-to touching under a civil action.

(Source: March 9, 1994/Tape 2/17:58-22:42)

TEXAS v. TAYLOR: Audience call-in questions during Dallas, Texas murder for hire trial of a woman charged with the murder of her husband's mistress. (Aired August 13, 1994)

13:48 - 16:12

ANCHOR: Our next caller is Joe, who is joining us from Texas. Joe, welcome to Court TV.

JOE: Good afternoon. I'm wondering, has a case ever been thrown out, to your knowledge, because a judge appears to be, as this judge appears to be totally one-sided on his rulings? I can't recall if one or two objections that have been raised by the defense that have gone in the defense's favor. Every ruling seems to be like this judge is just totally, totally biased in favor of the prosecution.

ANCHOR: Judge Evan Broadbelt, let me bring you in on this. I . . . just to give some balance to this, if I am representing the prosecution in this case, my response to that would be, well, it's because we are making good and valid objections that should be resolved in our favor as opposed to the defense. But getting to Joe's question -- if in fact in a situation such as that, you lose and you take an appeal, how difficult or how easy would it be to successfully appeal a case suggesting that, as Joe is suggesting here, that you didn't get a fair shake from the judge, you were losing far too many of those applications and motions?

BROADBELT: Well, Jack, it is a good question and a good question from Joe. But the reality is that because they keep a record of every objection and everything that happens in the trial, it may well be that one side is making a lot of improper objections that the judge has to

continually sustain. And so the judge doesn't have a choice on how many he sustains, how many he overrules. You hear the objections one at a time. And if it just so happens -- you don't keep a tally sheet of who's ahead or who's behind and so you have no control over the nature of the objections. You have to rule on them one at a time. But you make a record, you explain why you're sustaining an objection or overruling an objection, and then that record is available on the appeal. And if the appellate court sees a pattern of a judge making consistent errors in his rulings, that it appears that there was a bias and it appears that there was an unfair trial, then they have the power to reverse that conviction and send it back for a new trial.

ANCHOR: Is that type of appeal successful frequently?

BROADBELT: Rarely, rarely. In situations where there is clear error -- where a judge just makes a mistake and it's an honest mistake -- yes, you get reversals. Are there many times where . . . . They don't count up the number of objections that are sustained or overruled and use a tally sheet and say, "Ah, you're biased." That doesn't happen.

(Source: August 12, 1994 / Tape 1 / 18:02 - 20:27)

16:18 - 18:44

ANCHOR: Our next caller is Mike, who is calling from California. Mike, welcome to Court TV.

MIKE: Good afternoon, gentlemen. I just wanted to know if any of you'all have an opinion regarding a ruling yesterday afternoon - and this is kind of a follow-up on a call

a guy made a few minutes ago about the slant of the court towards the prosecution. Yesterday there was a ruling on the criminality of the police officer furnishing information to the book author? And the ruling -- it seemed to me very clear that it was, you know, that the information was confidential, that the police officer was a public servant, and that, you know, by the spirit and the words of the act that they were reading -- the Information Act or whatever -- that the guy was clearly in violation of the law, but the court came back with a ruling otherwise.

ANCHOR: Let's talk about that a little bit again with Judge Broadbelt. As we've been sitting through the trial here for about two weeks, now, as we often try to do, or always try to do, to achieve some balance in our coverage, in our commentary, we've had some prosecutors in here, we've had some defense attorneys in here. And, not surprisingly, I've found for the most part that the prosecutors have felt that the judge's decisions have been fair and accurate and correct, and the defense attorneys generally felt that the judge is ruling far too often in favor of the prosecution. You are in an interesting position because you have been a prosecutor, you have been a defense attorney, and now you are serving as a Judge. Mike says, look -- his thought is that this is a decision that should have gone in favor of the defense, not the prosecution. Is it your sense that it's not at all unusual to see that kind of division, even with people that you will acknowledge are good,honest lawyers -- prosecutors come on one side and defense attorneys come on the other side?

BROADBELT: It happens on a daily basis, Jack, in courtrooms all around this country. The difficulty -- and I can't comment on this

particular ruling, because I frankly didn't see it -- but again a judge has to make a ruling on each issue and each challenge as it is raised and give his reasons for it and that is subject to review by an appellate court. Now, it may well be that he is incorrect on . . . and overruled by an appellate court if there is a conviction here and there was some criminal conduct as a result of disclosing confidential information. But that, again, may not affect the admissibility of that evidence in the trial itself. It may affect the future of Investigator McGowan, but it certainly may not affect the jury's decision in this trial.

(Source: August 12, 1994 / Tape 1 / 24:47 - 27:16)

TEXAS v. LUCAS: Retrial in Dallas, Texas of a man accused of killing his mother for her money. (Aired September 9 and 14, 1994)

18:50 - 20:30

ANCHOR: Now, we do know that in that first trial -- it was tried down there in Tyler, Texas -- and one of the reasons why I believe they were so successful in getting a change of venue, they said during the first trial there was a group of influential citizens who used to sit in the courtroom and take a bead on that jury, so you kind of wonder just with the little information that we have found out in day 3, it is a wonder that they didn't fight a little harder to get it out of there the first time around.

BROADBELT: Well, the concept of the change of venue is interesting because -- as we were talking earlier -- the original concept of a jury of your peers is people from the community who actually know you, who know your reputation for honesty, truthfulness, whether or not you wold do this. I think what we're seeing here is the tone of the prosecution's case clearly is, there's going to be a parade of witnesses who are going to say, we think that this defendant has the capability of killing his mother based on this reputation concept. We don't have an eyewitness who says that he hit his mother and killed her, but we do have the feeling of the community and these people who think that his story doesn't sound quite right and he probably did it because he couldn't manage his money very well and he didn't get along with his mother and his mother didn't like his wife. When you have a jury that's made up of people from that same community, they may have that feeling, and they're saying, "Well, is he capable of it? Perhaps he is, "without looking at

the hard evidence. You go outside that venue -- the people in Dallas don't know that reputation -- and those jurors are going to say, "Well, let's look at . . . show me the hard evidence. Show me the circumstantial evidence, the factual evidence to support your assumption or your belief in the reputation that he is capable of doing this, not just your opinion."

(Source: September 9, 1994 / Tape 2 / 55:11 - 56:50)

20:41 - 23:16

ANCHOR: . . . Evan, before we go back into this, let's talk about first, there was this big blow-up of a letter that was introduced in front of the jury, which was a letter from an attorney from a legal firm that had investigated this irrevocable trust that Baker Lucas had set up for his wife and his son before he died. Now, the defense was arguing that that whole . . . that letter was covered by attorney-client privilege, that it inadvertently got into a file of material when Steven Lucas went to this man to say take a look at all the financial transactions. The judge didn't hold that, but let's talk about, first of all, what if you had a situation like that, that you put a letter in there but you didn't mean for this person to see.

BROADBELT: Well, Carol, the judge made his ruling earlier today, and it was very clear that, on the law in Texas, that the inadvertent release of that does not waive the attorney-client privilege. Clearly, this is a letter that is sent from an attorney to a client giving the client information that the client has requested about their legal relationship. And that is governed by the privilege and it's a

constitutionally protected privilege. So there must be, under Texas law, as in most jurisdictions, a conscious and voluntary release of that or waiver of that privilege by the client. And what happened in that hearing that was held outside the presence of the jury was that the defendant said that it was in a pile of other papers and he didn't mean to give that to the financial advisor and therefore waive his privilege. He wasn't intentionally waiving his privilege. And the difficulty was that obviously his act was voluntary. He physically gave the letter to the financial advisor. And the judge in his ruling said that, well, the state can introduce that letter. I am also going to tell the jury that they also have the right to exclude that letter if they choose to, much as they would with a confession or a written statement by a defendant, by deciding that it wasn't voluntary.

ANCHOR: Well, Mr. Cantrell said too, I believe, that at some point that -- he took that letter and said, "And what about this?" so he was kind of, really, in other words, that he probably didn't hide it in there. I think it was . . . .

BROADBELT: Clearly, the Judge made a factual decision, not a legal decision, that Cantrell clearly recalled that the defendant said, "Here is the letter from the lawyer and this is what it says. I get an income benefit from this trust." And the Judge clearly made a factual decision that he believed Mr. Cantrell and not the defendant. But he is also leaving that ultimate decision up to the jury as to which of the witnesses they will believe.

(Source: September 14, 1994 / Tape 4 / 02:00 - 04:36)

WISCONSIN v. AVERY: First-degree murder trial of two brothers accused of killing a neighborhood rival. (Aired September 2, 1994)

23:21 - 25:36

ANCHOR: This trial took place just a few weeks ago in this courtroom in Milwaukee, Wisconsin. We'll be taking you into the courtroom to continue with our coverage of the testimony -- the defense putting on witnesses on behalf of one of the defendants, Andre Avery. Before we do that, let's first introduce Judge Evan Broadbelt, who is going to be spending some time with us this morning, a frequent guest with us here on Court TV, a municipal court judge in a variety of municipalities in New Jersey, former prosecutor, criminal defense attorney. We heard Fred Graham mention that for the first time in the judicial history of the State of Wisconsin there are two juries sitting in one courtroom for a single trial. Explain to us the reason why you use two juries to handle a case such as this.

BROADBELT: Jack, the rationale has become in the -- prior to using the two juries -- where you had codefendants who had given statements and one may implicate the other defendant, the necessity was that they had to be tried separately. So, the tradition used to be you try one defendant first to one jury, and then try the second defendant later. What the courts found out was that witnesses were testifying twice in the same, basically the same case. So we've developed now this concept of having what you might call parallel juries, where the cases are going on at the same time in the same courtroom. There are a lot of common witnesses -- the experts, the police officers -- who then only have to testify one time. And when it gets to the

strategic part of the case where one defendant may implicate another, then that jury that shouldn't hear that evidence can be excused from the room, and that case can proceed as to the one defendant, and you save a lot of time and a lot of money, and you don't have to go through testimony twice.

ANCHOR: So does it surprise you then that in a case such as this where initially one defendant's saying yes -- initially starts off saying, "I know nothing about it," then ultimately says, "yes, I did it, but I had to do it to protect my brother" -- and then the other defendant, the brother, saying, "I don't know anything about this at all" -- does it surprise you then that the decision was, let's be more cautious, let's do this with two juries?

BROADBELT: It doesn't surprise me at all. I think it's the safer way to proceed. Certainly it gives the -- although it's designed to protect the rights of the defendant -- it certainly gives the prosecution an advantage, because they don't have their witnesses giving their testimony under oath one time so the defense then has a transcript of the prior testimony to cross-examine them on. The defense only gets one shot at each witness.

(Source: September 2, 1994 / Tape 1 / 12:57 - 15:13)

25:46 - 28:37

ANCHOR: Let's talk a little bit with Judge Evan Broadbelt about what we've been seeing here. You and I were commenting on the nature of this type of cross-examination by a prosecutor.

BROADBELT: Well, Jack, she's very aggressive. This is probably a prosecutor's dream witness

because there are so many opportunities to cross-examine. When he uses the "street organization" euphemism for his gang, for example, that's an opportunity for a prosecutor to hammer away at that concept in terms of his credibility and believability. And, if you notice, she kept asking question after question in rapid succession, really not paying any attention to the answer that was coming out, saying "you never back away from trouble, do you?" And he says, "Yes, I do," but she doesn't follow up and say, "Well, when did you back away from trouble?" She's not going to ask that question. She specifically goes to an incident here he didn't back away and asks him about that and that's a very good prosecutorial technique.

ANCHOR: So it's one of these situations where you as the prosecutor are hoping that the jury is listening to your questions and not really paying any attention to the answer given by the witness?

BROADBELT: Oh, absolutely. that's all she wants them to hear is her question and the terminology and the, if you will, evidence that's really not evidence that she's testifying to.

ANCHOR: We hard at the end of his direct examination, where defense attorney Robin Shellow asked him, "have you been convicted in the past, how many times?" and he said eight time. Firstly, how can that type of testimony, the fact of prior convictions on the part of a witness, be used by a jury?

BROADBELT: Generally, Jack, any criminal convictions of a witness, any witness, can be used -- and a judge will give the jury instructions can be used -- in the jury's determining the credibility or believability of that witness, so that you

can say as jurors, well this person has been convicted of perjury or larceny or assault or whatever it is, so we know that much about that person's character -- that he has committed these crimes -- and therefore we can decide whether or not we'll believe him based upon that, among other things. Do we, does his story sound credible? But, in addition to that is can we believe somebody who's a thief or a robber or somebody who is arrested for possession of drugs and weapons? Can we believe that person?

ANCHOR: Contrast that to a situation where, and I'm not talking about this case, but where you have a defendant on trial, and the defendant has been convicted previously of some things. Can the prosecutor stand up without anything else happening and say to the jury, "and by the way this defendant who is on trial has been convicted three or four times before of other things."

BROADBELT: Oh, absolutely not, because you have the presumption of innocence that attaches to each case individually whether you've been convicted eight times as this witness said. But, if you're a defendant, unless you get on the witness stand and waive your right against self-incrimination, the prosecutor can't talk about your previous history at all.

(Source: September 2, 1994 / Tape 1 / 43:59 - 46:51)

28:52 - 30:59

ANCHOR: Let's talk a little bit with Judge Evan Broadbelt, our guest commentator this morning. Here [the defense attorney] is representing a man who even the prosecution says didn't have a gun, didn't do any shooting, yet the prosecution is saying the jury should nevertheless find

Leonard Avery guilty of first-degree intentional homicide. What is the legal theory that would allow that to happen if everybody says he didn't have a gun in his hand?

BROADBELT: Well Jack, the theory is that he in effect was the decoy and there was a conspiracy between the brothers. There was conversation by phone that he was going to lead Chris Davis into this trap and that his brother Andre would be outside lying in wait, if you will, so that he could lead the victim out to be killed by Andre. So, if the jury believes that there was this conspiracy and this plan between the two brothers, then he can be just as guilty as the actual shooter.

ANCHOR: How difficult do you think it wold be for the jurors here -- and we know that there are separate juries, but we also know that there was some common testimony offered during the course of the trial -- you would suppose that the jury has more of a sense of Andre being the shooter than Leonard certainly -- how difficult do you think it wold be for jurors to separate the two of them in their minds and to do what the defense attorney here is asking them to do: don't convict him because he's Andre's brother; don't convict him because of anything Andre did, but rather just look at Leonard himself. Is that a tough thing to ask them to do?

BROADBELT: Well, no, I don't think so. I think a jury can do that. I think they'll look at it reasonably and say, "first of all, we have to look at Leonard and not Andre, for his individual action." But part and parcel of that is that if he had a conspiracy with Andre, they have to look at them together and make a decision of whether they think there was a conspiracy or not. The defense is going to argue: Andre is the one that had the grudge with

Chris Davis, Andre is the one that had Chris Davis put a gun to his head, so clearly Andre is the one who has the reason and the motive to want to kill Chris Davis, and not Leonard. So it may well have been another reason that Andre had and he just happened upon the scene as his brother was coming out and it was convenient for Andre to say that he was trying to defend Leonard just to protect himself when Leonard knew nothing about it.

(Source: September 2, 1994 / Tape 3 / 43:44 - 45:53)

31:10 - 32:09

ANCHOR: Judge Evan Broadbelt, let me bring you into this discussion here. When you are talking in terms of sentencing, what sort of factors would a sentencing judge be looking at in a case such as this, where we know that there is a mandatory imposition here of life in prison but there can be some parole elements that are attached to it. What sort of things would a judge be looking at before she, in this case, will make a determination whether any of that would be appropriate?

BROADBELT: Well, there's two different categories: the aggravating circumstances and mitigating circumstances. And they would look at prior criminal record in terms of aggravating circumstances, the nature of the offense, the nature of the charge, and the character of the individuals. And, in terms of mitigation, you look at the background, the family, certainly, the family history. And, the families of all of these individuals caught up in this unfortunate trial are good families, so that may have some mitigating factor in terms of the sentences imposed.

(Source: September 2, 1994 / Tape 3 / 53:32 - 54:31)

AMERICAN LAWYER MEDIA, L.P.

May 19, 1994

TO: ALL COURT TV COMMENTATORS

FROM: STEVE-BRILL

Thank you for joining us. Our goal is to teach non-lawyers how our legal system really works. and we need you to help us to do that. Your role is to teach and explain, not to take sides in any way. Toward that end, here are some important pointers for your appearance with us.

1. Your Audience Is A Lay Audience:

Remember, your audience is mostly non-lawyers. (Think of a housewife where I grew up out in Queens.)

Your job is to help explain to them what is happening in court today. If there is a hearsay objection, we want to explain what that means. You are their teacher.

2. Don't Usurp The Jury's Role:

We do not want to taint trials in even the slightest way (or give our viewers anything other than the picture the jury is seeing) by having our anchors or commentators comment on the credibility of a witness or the overall guilt or innocence of a party.

It is fine to say that "the purpose of Jones' testimony was to establish a motive, and that is wy he talked about Smith's alleged hatred for the deceased." That's part of your job as an explainer of the process.

But please do not say "Jones sure seemed to establish that Smith had a reason to kill the deceased." Or, "Jones seemed like he was lying to

me." Or, worst of all, "this case looks open and shut."

Similarly, we want you to explain trial strategy, such as "Prosecutor Jones is clearly trying to make that alibi witness less credible by bringing up his prior convictions." But please don't say something like "Bringing up those alibi convictions was quite a coup for the prosecutor; any jury will be convinced by that."

I know that this will often be a fine line, but, again, please err on the side of explaining the process as a generic matter in the context of this case rather than giving your blow by blow of who's winning or losing.

3. Avoid Jargon Unless You Explain It:

Never, ever use legal jargon, unless you explain it. For example, don't say "hearsay" -- unless you are referring to it as something that was just said in court and are explaining it. It's true that our anchors are all trained lawyers, but make believe they aren't when you are talking to them.

In this regard, common words that lawyers use and that lay people might not understand and that you should avoid are: voir dire, hearsay, direct testimony, deposition, Miranda right, impeach, and cross (as opposed to cross examination). There are lots of others; again, remember this is a lay audience.

So, if you do use these terms, be sure to explain them as you do.

4. Please Stress The Burden of Proof and The Presumption of Innocence In Criminal Cases

Again, we do not want to taint the jury process or give our viewers a distorted picture of the trial as the jury is seeing it. Thus, when you can it would be helpful to remind viewers of the presumption of innocence in a criminal case.

5. Please Teach; Don't Advocate

Finally, although in your practice you may be associated with one particular point of view, please step back from that and try, again, to be a teacher rather than an advocate. Thus, if you are a renowned First Amendment lawyer and we are covering a libel case, your role is to explain the process and the lawyers' strategies, not take sides in the underlying case. Think of your appearance as civic class, not as "Nightline" or "Cross Fire." We want our debates to take place in the courtroom, not in our studio.

Thanks again!

Supreme Court, U.S.
FILED
FEB 13 1997
CLERK

(3)

No. 96-1125

In the

Supreme Court of the United States

October Term, 1996

In Re: The Inquiry of Evan W. Broadbelt, J.M.C.

On Petition for a Writ of Certiorari To The Supreme Court of New Jersey

Brief in Opposition on Behalf of Respondent Advisory Committee on Extrajudicial Activities

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32 pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether a sitting municipal court judge may make regular appearances on commercial television broadcasts, prominently identified as a judge, for the purpose of providing "color commentary" on pending criminal trials under Canons 3A(8) and 2B of the Code of Judicial Conduct.

2. Whether the application of Canons 3A(8) and 2B to petitioner's conduct violates his First Amendment rights where the Canons further the substantial governmental interest in preserving the independence and integrity of the judiciary and where the restriction on petitioner's conduct is no more restrictive than necessary to accomplish this aim.

3. Whether petitioner's due process rights were infringed where he never raised the due process claim below; the facts of the case are undisputed; he has not been deprived of any identified property or liberty interest, and where he instituted the proceedings at issue, fully briefed the matter, and orally presented his position to the New Jersey Supreme Court.

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No. 96-1125

In the

Supreme Court of the United States

October Term, 1996

In Re: The Inquiry of Evan W. Broadbelt, J.M.C.

Brief in Opposition to Petition for A Writ of Certiorari on Behalf of Respondent Advisory Committee on Extrajudicial Activities

COUNTERSTATEMENT OF THE CASE

I. Introduction

The primary issue in this case is whether, under the New Jersey Supreme Court's Code of Judicial Conduct, a sitting New Jersey municipal court judge, prominently identified as such, may regularly appear on commercial television broadcasts to provide "color commentary" on pending criminal trials that are either being shown on, or are the subject of, the broadcasts. According to the chief executive officer of the company which sponsors these broadcasts, the purpose of the judge's appearances is to avoid having "a stacked deck program" on which only defense attorneys appear.

The New Jersey Supreme Court held that the appearances by the judge would violate Canons 3A(8) and 2B of the Code of Judicial Conduct. By prohibiting the judge from commenting on pending criminal cases in accordance with Canon 3A(8), the Court avoided the possibility of undue influence on the judicial process and the threat to public

confidence imposed by a judge criticizing the rulings or technique of a judge in the same or a sister jurisdiction in an ongoing proceeding. Because of the regular and repeated appearances by the judge on the programs, the Court also ensured that the judge did not lend the prestige of his office to the broadcasts in violation of Canon 2B.

In issuing its ruling, the Court noted that it was not imposing an absolute bar to judges appearing on commercial television programs nor prohibiting judges from commenting on court procedures or on cases that are no longer pending. The Court also directed its Advisory Committee on Extrajudicial Activities to begin to formulate standards to govern all such appearances in the future.

The New Jersey Supreme Court's decision is plainly in the mainstream of well-established judicial precedent in this area and is consistent with the rulings of every other state judicial ethics advisory committee which has addressed the question. Indeed, in his petition for a writ of certiorari, the petitioner is unable to point to a single case or precedent which supports his claim that the Canons do not prohibit his appearances.

Equally unpersuasive are the constitutional law arguments petitioner belatedly raises toward the end of his petition. The New Jersey Supreme Court's ruling plainly did not violate petitioner's First Amendment right to free speech. The limited restriction on the judge's comments imposed here clearly furthers the substantial governmental interest of avoiding material prejudice to an adjudicatory proceeding and preserving the independence and integrity of the judiciary. Further, the restriction is certainly no greater than is necessary to protect these interests and petitioner retains a wide variety of means to fulfill his desire to expound on the law.

Finally, the due process argument petitioner tacks on at the end of his petition is meritless. His contention that he was

entitled to a hearing was not even raised before the New Jersey Supreme Court. In any event, the Court permitted him to submit whatever arguments and proofs he wished to and to appear before it to orally argue the petition which he himself had instituted.

In sum, the New Jersey Supreme Court correctly decided this matter and the arguments raised by petitioner do not warrant review by this Court. Accordingly, the petition for certiorari should be denied.

II. Procedural and Factual Background

Petitioner Evan W. Broadbelt has been a municipal court judge since 1982 and presently serves in five municipalities in New Jersey. Municipal court judges are appointed for three-year terms by the mayor or governing body of the municipality. N.J.S.A. 2B:12-4. A municipal court has jurisdiction over violations of local ordinances, violations of motor vehicle and traffic laws, disorderly persons offenses and other non-indictable offenses. N.J.S.A. 2B:12-17.

The conduct of municipal court judges, like all New Jersey judges, is governed by the Code of Judicial Conduct. The Code comprises seven Canons that provide guidance on the manner in which judges are to comport themselves. Matter of Seaman, 627 A.2d 106, 120 (N.J. 1993). "The ultimate and permeating objective of the [C]anons . . . is to maintain the integrity of the judiciary and public confidence in that integrity. Accordingly, the [C]anons evidence concern not only for the reality of judicial integrity, but for the appearance of that reality." Id. at 121.

Since 1992, petitioner has appeared over 50 times as a guest commentator on "Court TV" (App. 3a). Court TV is a commercial enterprise which, among other things, records and broadcasts ongoing court proceedings. During these broadcasts, and after having been identified as a judge,

petitioner would provide what he has described as "color commentary" on criminal trials then being conducted in various jurisdictions throughout the United States, including New Jersey (App. 3a).

Between November 1994 and March 1995, petitioner also appeared on the "Geraldo Rivera Live" program. (App. 3a). During the broadcasts on which he appeared, again prominently identified as a judge, petitioner's assignment was to provide commentary on the criminal trial in the case of State of California v. O.J. Simpson (App. 3a).

In December 1994, following an appearance on a third television program, "Legal Line," petitioner was contacted by the Assignment Judge for the vicinage, Hon. Lawrence M. Lawson, A.J.S.C. Judge Lawson advised petitioner that prior approval from him was required before any further television appearances (App. 3a). Judge Lawson also requested all municipal court judges in the vicinage to notify him before making any television or radio appearances (App. 54a).

After petitioner made two appearances on "Geraldo Live," on March 20, 1995, Judge Lawson advised petitioner that he had to "vitiate [his] prior approval of [petitioner] appearing on the 'Geraldo' show as a legal commentator" (App. 37a). After reviewing the Code of Judicial Conduct, Judge Lawson concluded that petitioner's commentary on pending trials as a New Jersey municipal court judge on behalf of these commercial enterprises violated Canon 2B ("A judge should not lend the prestige of office to advance the private interests of others...") and Canon 3A(8) ("A judge should abstain from public comment about a pending or impending proceeding in any court...") (App. 37a-38a). By letter dated March 20, 1995, petitioner informed Judge Lawson that he disagreed with his determination (App. 40a-42a). On that same date, Judge Lawson referred the matter to the Advisory Committee on Extrajudicial Activities for review (App. 43a-45a).

The Advisory Committee on Extrajudicial Activities (hereinafter "the Committee") was appointed by the New Jersey Supreme Court in March 1984 "to undertake a comprehensive study of permissible activities for New Jersey judges outside of their strictly judicial functions and to develop criteria or guidelines to aid judges in avoiding ethical improprieties in fact and appearance in their off-the-bench lives." Guidelines for Extrajudicial Activities and Report of Supreme Court Committee on Extrajudicial Activities (Abridged), amended January 1995. Judges may address inquiries concerning extrajudicial activities to the Committee. R. 1:18A-2. The Committee reviews the inquiry and renders an opinion if concurred in by a majority of its members. If the judge disagrees with the opinion, he or she may seek review of the opinion before the New Jersey Supreme Court. R. 1:18A-7.

On March 31, 1995, petitioner filed an inquiry for the Committee's consideration (App. 46a - 53a). In a letter dated April 18, 1995, the Committee Secretary advised petitioner that the Committee had met and had determined to disapprove petitioner's continued appearances on the commercial broadcast programs to discuss ongoing trials (App. 36a). The Committee advised petitioner that an advisory opinion would be issued after its next formal meeting (App. 36a). Before the Committee's meeting, however, petitioner filed his petition for review with the Supreme Court challenging the Committee's letter of April 18, 1995. (App. 83a - 102a).

On June 23, 1995, the Committee Secretary sent petitioner an "Advisory Letter" (Opinion #13-95) (App. 34a - 35a). This Opinion advised petitioner that the Committee had considered his inquiry again at its meeting on June 16 and had determined "to ratify its previous vote to disapprove your appearance on Court TV and Geraldo Live" (App. 34a). The Opinion explained that "[t]he Committee was of the view that such appearances would not be appropriate under the relevant portion of Canon 2 (a judge should not lend the prestige of

office to advance the private interests of others)" (App. 34a - 35a).

In a Corrected Order dated July 5, 1995, the New Jersey Supreme Court granted petitioner's petition for review of Opinion #13-95 (App. 33a). After giving petitioner the opportunity to supplement the record, brief and orally argue the matter, the Court issued its opinion on October 10, 1996 (App. 1a - 32a). 146 N.J. 501, 683 A.2d 543.

Like the Advisory Committee, and every other state court and judicial ethics committee which has examined the issue, (App. 7a - 13a, 19a - 21a), the New Jersey Supreme Court held that a sitting judge could not regularly appear on commercially-sponsored television broadcasts to provide commentary on pending criminal trials. The Court found that this commentary violated Canon 3A(8), which states that "[a] judge should abstain from public comment about a pending or impending proceeding in any court ...." (App. 5a - 15a). By prohibiting judges from commenting on pending cases, the Canon "avoid[s] the possibility of undue influence on the judicial process and the threat to public confidence posed by a judge from one jurisdiction criticizing the rulings or technique of a judge from a different jurisdiction" (App. 14a). Because such commentary during the course of a criminal proceeding "could affect outcome .., appear to exert pressure on [a] judge to decide a certain way, and ... undermine public confidence in judicial decisions," the Court ruled that petitioner's appearances were "inappropriate and had the potential to compromise the integrity of the judiciary in New Jersey" (App. 14a - 15a).

The New Jersey Supreme Court also found that petitioner's commentary violated Canon 2B, which forbids a judge from "lend[ing] the prestige of office to advance the private interests of others...." (App. 15a-16a). Here, the purpose of petitioner's regular appearances on the programs he affiliated himself with was to "balance out" the numerous

defense attorneys who also regularly appeared on the broadcasts. 141 N.J.L.J. at Index Page 2270. Because of the frequency of petitioner's appearances, the Court found that he "became regularly identified with the program, thereby lending it the prestige of his judicial office" (App. 22a).

In finding that petitioner's repeated appearances to comment on pending trials were prohibited by the Code of Judicial Conduct, the New Jersey Supreme Court was careful to note that not all television commentary by a judge would be improper. For example, a judge could, consistent with Canon 3A(8), make statements in the course of his or her official duties, make comments concerning court procedure or discuss a case that is no longer pending (App. 8a). Canon 2B would also not bar a judge from making appearances from time-to-time on both public and commercial television programs to comment on the law (App. 22a). The Court directed its Advisory Committee to begin to formulate standards to govern all such appearances in the future (App. 23a).

The New Jersey Supreme Court also rejected petitioner's claim that his First Amendment rights had been unreasonably restricted (App. 25a). Noting, as every court which has examined this issue has done, that limitations may be placed on a judge's First Amendment rights (App. 25a), the Court determined that the rule the United States Supreme Court had applied to restrictions on an attorney's speech in Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991) should be applied here. Under the Gentile middle-tier scrutiny test, which the New Jersey Supreme Court had previously applied to attorneys in In re Hinds, 449 A.2d 483 (N.J. 1982), a regulation will be found constitutional if it (1) furthers an important or substantial governmental interest unrelated to the suppression of expression and (2) is no more restrictive than necessary to protect the governmental interest involved (App. 26a - 30a). The Court found that the avoidance of material prejudice to an adjudicatory proceeding, the need to preserve the independence and integrity of the judiciary, and the need

to maintain public confidence in the judiciary "-- the interests underlying Canons 3A(8) and 2B -- are obviously interests of sufficient magnitude to sustain those Canons under the Gentile/Hinds standard...." (App. 30a). The Court also found "that the restrictions on a judge's speech imposed by those Canons are no greater than necessary" (App. 30a - 31a). Therefore, the Court upheld "the constitutionality of their application to [p]etitioner," and affirmed Opinion No. 13-95 of the Advisory Committee (App. 31a).

ARGUMENT

THE SUPREME COURT LACKS JURISDICTION TO CONSIDER PETITIONER'S STATE LAW CLAIMS AND, IN ANY EVENT, PETITIONER HAS FAILED TO MEET THE STANDARDS FOR A GRANT OF CERTIORARI BECAUSE THE STATE COURT DECISION DOES NOT CONFLICT WITH APPLICABLE DECISIONS OF THE SUPREME COURT AND THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR GRANTING THE WRIT.

Petitioner seeks review of the New Jersey Supreme Court's decision pursuant to 28 U.S.C. §1257 (Pet. at 3). Under that statute, however, certiorari may only be granted: (1) where the validity of a federal treaty or statute is drawn in question; (2) where the validity of a state statute is drawn in question on the ground of it being repugnant to federal law, or (3) "where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority

exercised under, the United States." As the discussion which follows demonstrates, petitioner has failed to meet any of these criteria.

Petitioner's main contention is that his conduct (regularly appearing on commercial television broadcasts for the purpose of providing "color commentary" on pending trials), did not violate the Code of Judicial Conduct adopted by the New Jersey Supreme Court. The Code, however, was adopted by the State Court pursuant to its state constitutional authority. See N.J. Const. (1947), Art. 6, §3. The issue of whether petitioner's conduct violated the Code was therefore purely one of state law in an area where the states have been given wide discretion. See Gruenburg v. Kavanagh, 413 F. Supp. 1132, 1135 (E.D. Mich. 1976) (A state that creates a judicial office may set standards of conduct for the judicial officer. The right to hold a judicial office derives from state constitutional and statutory provisions, not the federal constitution or laws), c.f. Pincham v. Illinois Judicial Inquiry Bd., 872 F.2d 1341, 1347 (7th Cir. 1989), cert. den. 493 U.S. 975 (1989) (A state has a vital interest in preserving a fair and impartial judiciary capable of maintaining the respect of its citizens and a federal court should therefore abstain from considering a challenge to state judicial disciplinary procedures). This issue does not raise a federal question, involve the validity of a federal statute or treaty, or implicate a right, privilege or immunity set up or claimed under the United States Constitution. Therefore, the Court does not have jurisdiction under 28 U.S.C. §1257 to consider this issue.

Moreover, the arguments raised by petitioner are almost entirely factual in nature. Thus, he contends that his specific conduct, as a factual matter, was not sufficient to justify the State Court's finding that he had violated the Code (Pet. at 10 - 18; 22 - 24). The Court, however, will generally deny certiorari in a case where, as here, review is sought of a lower court decision which turns solely upon an analysis of

the particular facts involved. United States v. Johnson, 268 U.S. 220, 227 (1925). Accordingly, petitioner's claims that the state court's findings were not supported by the record do not warrant the granting of certiorari.

With regard to the First Amendment and due process arguments petitioner raises later in his brief, it is a fundamental concept that review by the Court on writ of certiorari "is not a matter of right, but of judicial discretion." Supreme Court Rule 10. Given such discretion, it has been the long standing practice of the Court to grant the writ "only for compelling reasons." Ibid. Further, the Court will generally grant certiorari from a state court determination only where the state court has decided an important federal question of first impression or in a way which conflicts with relevant decisions of the Court. Id.

None of these reasons exist in this case. The New Jersey Supreme Court's decision is in harmony with that of every other court which has considered the constitutional issues raised by petitioner. Indeed, in his petition, petitioner cites only those cases relied upon by the State Court in its opinion. Thus, no issues of first impression are presented in the petition and the State Court's decision is consistent with the decisions reached by the other courts which have considered similar matters. Because the Court lacks jurisdiction over the state law issues raised in the petition and because the federal issues raised by petitioner are insubstantial, the petition for certiorari should be denied.

A.

BECAUSE PETITIONER WAS A SITTING JUDGE WHO WISHED TO PROVIDE "COLOR COMMENTARY" ON PENDING CRIMINAL TRIALS, THE NEW JERSEY SUPREME COURT CORRECTLY HELD THAT HIS REGULAR APPEARANCES ON COMMERCIAL TELEVISION PROGRAMS FOR THIS PURPOSE VIOLATED CANONS 3A(8) AND 2B OF THE CODE OF JUDICIAL CONDUCT.

Petitioner devotes most of his petition to his contention that the New Jersey Supreme Court incorrectly held that he violated the Code of Judicial Conduct. Certiorari, however, is not appropriate where the party filing the petition seeks to challenge only the correctness of the lower court's decision. Ross v. Moffitt, 417 U.S. 600, 616-17 (1974). This is particularly the case where, as here, the primary issue raised deals solely with state law, i.e., the application of the Code to petitioner's conduct. Certiorari should therefore be denied in this case because no federal issue is presented.

Moreover, the New Jersey Supreme Court correctly held that petitioner's commentary on pending criminal trials violated Canon 3A(8) of the Code of Judicial Conduct (App. 5a - 15a). That Canon provides that

> [a] judge should abstain from public comment about a pending proceeding in any court and should require similar abstention on the part of court personnel subject to the judge's

> direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.

The purpose of this Canon is clear. As former Justice Brennan wrote, in explaining the wisdom of judges abstaining from making comments on their decisions:

> A great Chief Justice of my home State was asked by a reporter to tell him what was meant by a passage in an opinion which had excited much lay comment. Replied the Chief Justice, "Sir, we write opinions, we don't explain them." This wasn't arrogance – it was his picturesque, if blunt, way of reminding the reporter that the reasons behind the social policy fostering an independent judiciary also require that the opinions by which judges support decisions must stand on their own merits without embellishment or comment from the judges who write or join them. [Address by William J. Brennan, Jr., Student Legal Forum, Charlottesville, Va., Feb. 17, 1959, cited in Westin, "Out-of-Court Commentary by United States Supreme Court Justices, 1790-1962: Of Free Speech and Judicial Lockjaw," 62 Colum L. Rev. 663 (1962).]

If it is unwise for a judge to comment upon the decisions he or she has rendered in contemporaneous, yet closed, cases, there is an even more compelling need to prohibit a judge from speaking about pending cases because of the great danger such comments pose to the integrity of the judicial system. The American Bar Association counterpart to New Jersey's Canon 3A(8) was drafted in response to the Court's decision in Sheppard v. Maxwell, 384 U.S. 333 (1966), where the Court reversed the murder conviction of the defendant because "massive, pervasive and prejudicial publicity" had deprived the defendant of his right to a fair trial. Gross, "Judicial Speech: Discipline and the First Amendment," 36 Syracuse L. Rev. 1181, 1229-30 (1986). The risk of damage to the integrity of the proceeding being commented upon is plainly present whenever the participants in the proceeding learn of and are potentially affected by, the comments of outsiders to the matter. This risk is only heightened where the person making the commentary is a sitting judge in the same or a sister jurisdiction because the remarks of such a commentator would naturally be expected to carry more weight than those of a lay commentator or even an attorney. Therefore, by barring judges from commenting upon any pending matter in any court, Canon 3A(8) seeks to preserve the integrity and impartiality of the judicial process.

The New Jersey Supreme Court's decision that Canon 3A(8) prevented petitioner from providing commentary on pending criminal proceedings is clearly in accord with the decisions issued by other courts which have examined the issue (App. 7a - 12a). See,e.g., Ryan v. Commission on Judicial Performance, 754 P.2d 724 (Cal. 1988) (judge who among other things, made statements to the press concerning a pending contempt order held to have violated the Canon); In re Benoit, 523 A.2d 1381 (Ma. 1987) (judge who wrote to a newspaper to defend a sentence he had imposed violated the Canon; United States v. Garwood, 16 M.J. 863 (A.C.M.R. 1983), aff'd 20 M.J. 148 (C.M.A.), cert. den. 474 U.S. 1005 (1985) (judge who expressed opinions on tactical decisions by

the defense crossed the line between permissible and impermissible commentary).

New Jersey's treatment of the issue is also directly in the mainstream of action taken by other state judicial ethics committees. Thus, for example, in Opinion 93-133, the New York Advisory Committee on Judicial Ethics considered the question of whether a judge could participate as an unpaid commentator on Court TV to make observations and offer comments on pending actions (App. 12a). Considering this issue, which is identical to the issue presented in this case, the New York Committee concluded that "[r]emarks made by the judge could...be seen as lending a judicial imprimatur to legal positions being advanced by one of the parties in an existing legal action, which legal positions may not have yet been ultimately determined" (App. 12a). Therefore, the Committee held that this activity could not be permitted. And, as the California Judicial Conduct Handbook so aptly declares in its discussion of that state's prohibition on a judge commenting on pending cases:

> In regard to comment on cases pending in another court, judges must avoid the unseemly spectacle of commenting on others' cases. Such comments could affect the result, or be seen by the judge before whom the case is pending as public judicial pressure to decide the case in a certain way. It also undermines public confidence in the decisions of the court. [App. 14a - 15a.]

Because petitioner's appearances on Court TV and other broadcasts required that he comment on pending criminal trials, the New Jersey Supreme Court correctly hold that petitioner's appearances were barred by Canon 3A(8).

In his brief, petitioner does not cite a single precedent to support his view that a sitting judge should be permitted to offer "color commentary" on pending criminal trials. Instead, he first asserts that the New Jersey Supreme Court should not have considered Canon 3A(8) because its Advisory Committee had only referred to Canon 2B in finding petitioner's conduct to be prohibited (Pet. at 10-11). In making this argument, however, petitioner overlooks the fact that he, himself, had advised the Supreme Court in his petition that "[t]he relevant Canon ... to be reviewed for this inquiry is Canon 3. Specifically in question is the provision contained in Canon 3A(8)...." (App. 90a). Petitioner had also addressed Canon 3A(8) in his submissions to the Advisory Committee (App. 48a - 50a), and in his correspondence to his Assignment Judge (App. 42a). Even if he had not placed Canon 3A(8) squarely in issue in this case, it is well established that an appellate court may consider reasons for supporting a decision that were not cited by the tribunal below. Isko v. Planning Board of Tp. of Livingston, 238 A.2d 457 (N.J. 1968). Therefore, petitioner's contention that the State Court erred in considering Canon 3A(8) must be rejected.

Petitioner's alternate argument, that his conduct was not as "hysterical, disparaging, unprofessional or opinionated" as that of the judges in the cases cited by the New Jersey Supreme Court, also falls far short of the mark (Pet. at 11-17). According to petitioner, unless and until it can be demonstrated that his comments on pending criminal trials have affected the outcome of those proceedings, he may continue to make them. This contention was correctly rejected by the Supreme Court. It must be borne in mind that petitioner's commentary, by its very design, was not a mere abstract discussion of legal issues; it was tied directly to specific pending cases, and the issues involved in those cases. "The text and context of [Canon 3A(8)] do not, expressly or by necessary implication, carry with them the requirement that the statement be made with the intent to affect the outcome or to impair the fairness of a particular case." In re Schenck,

870 P.2d 185, 202 (Ore. 1994), cert. den. _____ U.S. _____, 115 S.Ct. 195 (1994) (Judge's comments concerning a case he had handled held to violate Oregon code of judicial conduct). For example, by commenting on pending trials, a judge can convey the impression to the public that judges make decisions without hearing all of the evidence, thus reducing the public's confidence in the judicial office. Such comments may also, rightly or wrongly, be perceived by the public as favoring one side or the other in an ongoing proceeding, again working against the goal of the Code to preserve respect for the judiciary.

This is plainly evidenced by the comments which petitioner made in this case (App. 103a - 127a). Although petitioner tries his best to put the best interpretation on this commentary (Pet. at 21-22), and to present only self-selected and carefully edited excerpts of his 50 regular appearances on Court TV, the context of his comments is nevertheless discernable. Thus, for example, in one of the excerpts selected by petitioner as "representative" of his appearances, he opined that a prosecutor's cross-examination of a defense witness was "very aggressive. This is probably a prosecutor's dream witness because there are so many opportunities to cross-examine" (App. 122a - 123a). In another instance, petitioner commented on how a particular prosecution expert witness appeared to look on the stand (App. 106a - 107a); in another, he declared that the defense in a pending case would not be "very happy" with a particular charge lodged by the prosecution (App. 108a - 109a). On yet another occasion, petitioner concluded that a judge had "clearly made a factual decision that he believed" a particular witness (App. 120a). Contrary to petitioner's argument, these are the same types of comments which the courts in the cases relied upon by the New Jersey Supreme Court found to violate the Canon.

In addition, the very reason that petitioner was asked to participate in these broadcasts was to bring a point of view to the proceedings. Indeed, the chief executive officer of Court

TV has stated that, because "prosecutors, unlike defense attorneys, usually are reluctant to serve as commentators, ...it is important to have judges in that role." 141 N.J.L.J. at Index Page 2270. "'If you have just defense lawyers, you have a stacked deck.'" Ibid. Petitioner's argument that his comments did not harm or have the potential to harm the judicial process must therefore be rejected. Moreover, as previously discussed, the type of factual issues sought to be raised by petitioner plainly do not warrant the grant of certiorari.

The New Jersey Supreme Court also correctly held that petitioner's regular appearances on Court TV violated Canon 2B (App. 15a - 25a). Canon 2 of the Code of Judicial Conduct requires judges to avoid impropriety and the appearance of impropriety in all activities. The commentary to that Canon notes:

> Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety, and must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on personal conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

One of the specific restrictions imposed by this Canon is that "[a] judge should not lend the prestige of office to advance the private interests of others." Canon 2B. Like all of the other rules governing judicial conduct, this restriction must be broadly construed in keeping with its purpose of maintaining public confidence in the judicial system. Matter of Blackman, 591 A.2d 1339, 1343 (N.J. 1991).

Here, the New Jersey Supreme Court determined that petitioner's regular appearances, prominently identified as a municipal court judge, on these programs would advance the private interests of others, namely, the commercial broadcast entities for which he would provide commentary. These commercial enterprises obviously hope to make their programs more attractive both to the public and the advertisers they need to support them by having a sitting judge serve as a commentator. Thus, the judicial office is being used to benefit the private interests of these business concerns. This type of activity plainly violates Canon 2B.

Again, the New Jersey Supreme Court's decision concerning Canon 2B is completely in accord with decisions reached in other states (App. 19a - 23a). Thus, for example, in Opinion 94-17, the Judicial Ethics Advisory Committee of the Arizona Supreme Court ruled that a judge could not serve on the editorial advisory board of a magazine that featured medial issues aimed at professionals in the health service industry and the general public. The purpose of the advisory board would be to provide the publisher with a panel of experts, whose names and titles would be featured prominently in the publication, to support or contradict the points of view expressed by writers in published articles. The Committee held that this activity was "clearly proscribed by Canon 2B" because the "judge will clearly be identified as a judge of a particular court and will be lending the prestige of the judicial office to advance the private interests of others."

Similarly, the Advisory Committee on Standards of Judicial Conduct of the Supreme Court of South Carolina ruled, in Opinion No. 14-1991, that a judge could not appear on a local radio talk show to answer questions about the legal system posed by the public because this conduct would violate Canon 2B (App. 20a). As the Board held, "[i]n associating himself with the question and answer Radio Talk Show on a regular basis, the judge would clearly lend the prestige of his office to the advancement of the radio station, in an area

where the public perceives him to be an expert." (App. 20a - 21a).

Against this weight of authority, petitioner offers very little resistance. He maintains that his "color commentary" on pending criminal trials did not benefit Court TV (Pet. at 16-17). Yet, it is precisely because petitioner is a judge that his appearances are sought and, through his 50 appearances on its programs, he has clearly lent the prestige of his office to the network. Petitioner also asserts that the New Jersey Supreme Court did not explain why his conduct violated Canon 2B (Pet. at 16-17). The Court, however, expressly noted that "[b]ecause of the frequency of [petitioner's] appearances, [he] became regularly identified with the program, thereby lending it the prestige of his judicial office" (App. 22a).

Finally, petitioner argues that his conduct was permitted by Canon 4, which permits a judge to "teach concerning the law" (Pet. at 17-18). The flaw in petitioner's position, however, is his attempt to pigeon-hole his activity into a single Canon as opposed to judging the activity under all of the Canons that make up the Code of Judicial Conduct. It is well-established, and petitioner certainly cites no authority to the contrary, that even though a judge's comments may have some educational value, they are not permitted if they violate other Canons (App. 24a - 25a). See Schenck, supra, 870 P.2d at 202; In re Miller, 644 So.2d 75, 78 (Fla. 1994). Petitioner's contention must therefore be rejected.

In sum, petitioner has not presented a federal question warranting certiorari. The arguments he emphasizes in his brief are solely related to state law issues. Moreover, the State Court's resolution of those issues is completely in accord with the decisions reached in other states. Certiorari should therefore be denied.

B.

THE APPLICATION OF CANONS 3A(8) AND 2B TO PETITIONER'S CONDUCT CLEARLY DID NOT VIOLATE HIS FIRST AMENDMENT RIGHT TO FREE SPEECH.

More than halfway through his petition, petitioner raises the same First Amendment argument he had unsuccessfully presented to the New Jersey Supreme Court (Pet. at 18-23). This issue, however, is neither novel nor important and the State Court's decision is in harmony with those of other state courts. Indeed, petitioner does not, and indeed can not, dispute that no court has ever "sustained an argument that a judge is excused entirely by the First Amendment from complying with the Canons of Judicial Conduct." In re Fadeley, 802 P.2d 31, 44 (Ore. 1990). As the Supreme Court of Kansas stated in In re Inquiry Relating to Rome, 542 P.2d 676, 684 (1975):

> Although a judge has the right of free speech, that right, like those of nonjudicial persons, is not without limits. In taking his office a judge assumes added responsibilities and is held to a higher standard of conduct that the lay person. For a judge the right to speak freely is circumscribed by the code of judicial conduct, just as that of the lawyer is subject to the code of professional responsibility, and first amendment rights do not exempt a judge from discipline for proven judicial misconduct.

In Rome, the court found that the need to preserve the integrity of the judicial office through the state code of judicial conduct outweighed a judge's alleged First Amendment right to issue an order written in verse that mocked and degraded a defendant in a proceeding handled by the judge. 542 P.2d at 684. Similarly, in Schenk, supra, the Oregon Supreme Court rejected a claim that the First Amendment excused a judge from complying with the state canons of judicial conduct. 870 P.2d at 203-206. In Schenk, the judge had authored "a letter to the editor" and a "guest editorial" concerning a pending proceeding. Id. At 200. Finally, in Matter of Hey, 452 S.E.2d 24 (W. Va. 1994), the West Virginia Supreme Court found that a judge's comments about his own judicial discipline proceedings on a radio broadcast did not violate that state's code of judicial conduct. 452 S.E.2d at 33. The court, however, specifically noted that, consistent with the First Amendment, "speech" which does violate the code of judicial conduct or which concerns a pending or impending matter, may be regulated. Id. at 31-33.

In the present case, the New Jersey Supreme Court determined that Canons 3A(8) and 2B should be reviewed under the middle-tier scrutiny test applied by the Court to attorney speech in Gentile, supra. (App. 28a - 30a). Under that standard, which petitioner does not dispute is applicable of him (App. 19a - 21a), "the regulation of a judge's speech will be upheld if it furthers a substantial governmental interest unrelated to suppression of expression, and is no more restrictive than necessary." (App. 30a). The Canons at issue here and their application to petitioner plainly meet that test. The purpose of the Canons is to preserve the independence and integrity of, and maintain public confidence in, the judiciary. The Canons also avoid actual as well as potential material prejudice to ongoing adjudicatory proceedings. All of these are prime examples of governmental interests sufficient to uphold the restriction imposed here.

The restriction on regular appearances to comment on pending criminal trials is also no greater than necessary. A judge remains able to make statements in the course of his or her official duties, to comment on court procedure, to comment on completed cases and to make appearances that do not amount to regular appearances which lend the prestige of the judicial office to the broadcaster (App. 8a; 22a). The New Jersey Supreme Court has also asked its Advisory Committee to begin to formulate guidelines governing such appearances (App. 23a).

In response, all that petitioner raises is his petition is an argument that his specific conduct did not have the potential to affect the outcome of the pending criminal trials he commented on. As discussed above, however, petitioner's argument is not supported by the record which demonstrates that petitioner commented on such matters as witness credibility, the strategy of the parties and possible judicial bias in ongoing cases. Such statements clearly had the potential to cause prejudice to the ongoing proceedings. Moreover, an intent to interfere in the proceeding is not required to bring the Canons into play. Schenk, supra, 870 P.2d at 202. The New Jersey Supreme Court therefore correctly applied the Canons to petitioner.

In sum, the First Amendment issue petitioner raises has been the subject of prior judicial opinions, all of which are consistent with the New Jersey Supreme Court's decision in this case. Plainly, therefore, certiorari should be denied.

C.

PETITIONER'S DUE PROCESS CLAIM WAS NOT RAISED BELOW AND, IN ANY EVENT, PLAINLY LACKS MERIT.

Toward the end of his petition, petitioner alleges that the New Jersey Supreme Court violated his due process rights by finding that he had violated Canons 3A(8) and 2B. He maintains that, before making such a finding, the Court was required to provide him with notice of the charge and a hearing (Pet. at 24-28).

Petitioner's contention is totally without merit. As petitioner is forced to concede in his petition, he raised no due process issue before the New Jersey Supreme Court (Pet. at 7). Because the issue was not raised in that forum, it may not be considered by the Court. Singleton v. Wolff, 428 U.S. 106, 120 (1976).

In addition to never requesting a hearing, petitioner nowhere explains the proposed purpose of such a hearing. Here, the facts of the matter were undisputed as were the facts which petitioner himself presented to the State Supreme Court (App. 3a). Petitioner had the opportunity to present documents to both the Advisory Committee and the State Court. He also clearly knew the Canons which were being applied to him because he, himself, had advised the Court that those were the Canons which should be considered (App. 83a - 99a). Petitioner also had the opportunity to file legal briefs and to orally argue his position before the Supreme Court. The contention that petitioner did not receive the process due him is groundless.

Plaintiff's alleged due process rights were plainly not violated by the New Jersey Supreme Court's decision in this

case. Due process considerations are only implicated where an individual's property or liberty interests are at issue. Board of Regents v. Roth, 408 U.S. 564, 576-78 (1972). Several courts have taken the view that judges do not enjoy a property or liberty interest in their judicial office. See Gruenburg v. Kavanagh, supra, 413 F. Supp. at 1135; In re Del Rio, 256 N.W.2d 727 (Mich. 1977), app. dism. 434 U.S. 1029 (1978). O'Neil v. Baine, 568 S.W.2d 761, 768 (Mo. 1978). But, even if petitioner has a property interest in his judicial office, the New Jersey Supreme Court's decision that his commentary did not comport with the Canons did not effect any deprivation of that interest. Contrary to petitioner's claim, the court's decision did not constitute a "public admonition" of him (Pet. at 27). While the Court did find that petitioner "violated" the Canons, it did so in response to petitioner's own inquiry as to "whether his continued appearance on various televised commentary shows was violative of Canon 2B...." (Pet. at 8) (Emphasis added). Petitioner was not subject to public reprimand, was not suspended or demoted, received no public or private discipline, and was not otherwise deprived of any of the emoluments of his office in any way. Under these circumstances, petitioner cannot be heard to complain that he has been deprived of a property right in his official position.

Nor can petitioner successfully contend that he was deprived of a liberty interest. A deprivation of a liberty interest may occur where there is damage to one's standing in the community or where the state's conduct has imposed a stigma or other disability on an individual. Board of Regents v. Roth, supra, 408 U.S. at 573. An individual's good name and reputation alone, apart from some more tangible interest such as employment, however, do not implicate any liberty interest sufficient to invoke the procedural protections of the due process clause. Paul v. Davis, 424 U.S. 693 (1976); Bishop v. Wood, 426 U.S. 341, 348 (1976).

Here, petitioner has not been deprived of a liberty interest. Nothing has been "published" by the New Jersey Supreme Court which could even remotely be interpreted as affecting petitioner's reputation or standing in the community. Indeed, as petitioner has not hesitated to note several times in both his petition and in his public statements about the Court's decision, the Court stated in its decision that he was "a well-respected municipal judge" (Pet. at 9, 23; App. 3a). This is hardly consistent with a claim of a deprivation of a liberty interest. Petitioner's contention should therefore be rejected.

CONCLUSION

For all the reasons stated herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 96-1125

IN RE: INQUIRY OF EVAN W. BROADBELT, J.M.C.

AMICUS CURIAE BRIEF OF
THE THOMAS JEFFERSON CENTER
FOR THE PROTECTION OF FREE EXPRESSION
IN SUPPORT OF THE
PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF NEW JERSEY

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EDITOR'S NOTE

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QUESTION PRESENTED

[Although the Petition for Writ of Certiorari presents two questions for this Court to consider, this brief deals only with the question concerning Petitioner's First Amendment rights.]

Does the New Jersey Supreme Court's prohibition on Petitioner's continued guest appearances on television shows impermissibly infringe upon his First Amendment rights?

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Robert F. Copple, *From the Cloister to the Street: Judicial Ethics and Public Expression*, 64 DENV. U.L. REV. 549 (1988) 7

IN THE
SUPREME COURT OF THE UNITED STATES

No. 96-1125

IN RE: INQUIRY OF EVAN W. BROADBELT, J.M.C.

AMICUS CURIAE BRIEF OF
THE THOMAS JEFFERSON CENTER
FOR THE PROTECTION OF FREE EXPRESSION
IN SUPPORT OF THE
PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF NEW JERSEY

STATEMENT OF INTEREST

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan institution located in Charlottesville, Virginia, and affiliated with the University of Virginia. Devoted solely to the protection of freedoms of speech and press, the Center pursues its mission in a variety of ways including the filing of amicus curiae briefs, providing testimony before legislative bodies on the First Amendment implications of proposed legislation, and sponsoring national conferences on a number of topics relating to free speech.

STATEMENT OF FACTS

Amicus adopts the Statement of Facts submitted in the Petition for Certiorari.

SUMMARY OF ARGUMENT

This case presents an issue of utmost importance both to freedom of expression and to the judicial system of the United States. It is an issue that has yet to come before this Court and on which lower courts are in need of guidance.

The Petitioner has been told that he may not continue to share with television viewers and listeners his special insights on the workings of the courts, especially with regard to pending cases of great interest to the general public. His goal, through years of uncompensated service as a commentator on the legal system, has been to remove some of the mystery and misunderstanding from the courts and their proceedings. His popularity as a commentator suggests he must have been highly effective in that role.

What has been stifled by the judicial decree challenged here is pure speech, not shown to create a clear and present danger or to come within any of the other exceptions this Court has recognized to First Amendment freedoms. Even conceding, as one must, that the speech of judges is appropriately and severely constrained, curbs on their expression must reflect substantial government interests.

Quite different would be, for example, a prohibition on judicial comment concerning a case pending in, or likely to come before, the particular judge's court, or even on cases

pending in other courts within the state. Such a curb would serve to avoid both the risk and the appearance of impropriety, and the risk of any possible threat to the fairness of pending judicial proceedings. The much broader decree imposed in this case goes far beyond serving such interests, and reaches a substantial amount of protected speech that has great societal value.

The decree challenged here raises two additional and related First Amendment concerns. First, the Advisory Committee on Extrajudicial Activities clearly assumed, and exercised, virtually complete discretion. As this Court has repeatedly stated, such discretion creates the potential for discrimination based on the content of one's speech. Second, such discrimination appears to have occurred here because the limitation on Petitioner's speech was based, in part, on the fact it was to take place on commercial television as opposed to non-commercial television.

Such an analysis carries two disturbing implications -- one, that identical comments on public television would have been permissible; the other, that commercial sponsorship, as such, taints the medium and undermines its claim to free expression. The first inference is troubling because it suggests the Advisory Committee's real concern was with the medium and not, as other parts of the order imply, with the message. The second inference -- that commercial sponsorship changes the character of communications for free speech purposes -- violates a half century of this Court's First Amendment jurisprudence.

For these reasons, amicus urges the Court to grant the petition for certiorari.

I. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE IT WILL PROVIDE THIS COURT THE OPPORTUNITY TO ARTICULATE AN APPROPRIATE STANDARD FOR REVIEW OF GOVERNMENT REGULATIONS THAT SPECIFICALLY LIMIT THE SPEECH OF JUDGES.

At issue in this case is the degree to which a judge's speech may be limited consistent with the First Amendment. No judgments of this Court directly address this issue or provide a specific standard for regulating judicial speech. Review of the New Jersey Supreme Court's opinion in this matter demonstrates that guidance from this Court is needed. In its opinion, the New Jersey Supreme Court lists the various approaches to this issue that other courts have adopted. *In Re: The Inquiry of Evan W. Broadbelt, J.M.C.*, 146 N.J. 501, 517-520, 683 A.2d 543, 551-52 (1996) (Petitioner's Appendix p. 25a-31a). Then, without any explanation as to why one is more "appropriate" than another, the court selects one approach and misapplies it. *Id.* at 519-20, 683 A.2d at 552 (Petitioner's Appendix p. 28a-31a). By granting Petitioner's Motion for Certiorari, this Court would severely reduce the potential for future misapplications in this area, as well as ensure that the speech of judges is accorded an appropriate level of protection.

A. The status of a judge as a public employee does not remove from the state the heavy burden of demonstrating that limits on judicial speech are consistent with the First Amendment.

As with all regulations limiting speech, the standard for assessing a government regulation of a judge's speech should place the burden, not on the judge to prove that his or her speech is protected, but on the government to prove that it is unprotected. *See Nebraska Press Assn v. Stuart*, 427 U.S. 539, 558 (1976). The New Jersey Supreme Court effectively reversed the responsibility for the burden of persuasion by failing to require the state to prove that Petitioner's extrajudicial comments in fact threatened state interests.

The New Jersey Supreme Court properly recognized that a "judge does not relinquish his or her First Amendment rights on ascending to the bench." *In Re: The Inquiry of Evan W. Broadbelt, J.M.C.*, 146 N.J. at 517, 683 A.2d at 551 (Petitioner's Appendix p. 25a). Decisions of this Court make it clear that a judge would not lose the protections of the First Amendment simply because of his status as a government employee. *See Pickering v. Board of Educ.*, 391 U.S. 563 (1968). In reaffirming the principles of *Pickering* last summer, and making clear that their application extends to government contractors (*Board of County Comm'rs v. Umbehr*, 116 S. Ct. 2342 (1996)), this Court underscored the central role of the First Amendment in the public sector. *See also U.S. v. Treasury Employees*, 513 U.S. 454 (1995).

While *Pickering* and its progeny permit the tailoring of rules to fit the needs of particular positions and relationships within the public service (*e.g.*, *Branti v. Finkel*, 445 U.S. 507 (1980)), basic First Amendment protection applies to all who hold government positions.

B. Although the principles of this Court's decision in *Pickering v. Board of Educ.* would permit some constraints on judicial speech, such limits must serve substantial government interests in propriety and fairness.

Because of a judge's status as a public employee, a strong argument can be made that the *Pickering* test is appropriate for assessing regulations that limit his or her speech. In *Pickering*, this Court articulated a two-prong test for determining the constitutionality of regulations aimed at limiting a public employee's speech. 391 U.S. at 568. First, it must be determined if the public employee's speech addresses a matter of legitimate public concern. If so, it must then be determined whether the employee's right to speak freely outweighs the public employer's interest in regulating the speech to promote the efficiency of the public services it performs. *Id.*

Clearly, Petitioner's comments about judicial proceedings are of legitimate public concern, thus satisfying the first prong of *Pickering*. Indeed, such comments actually promote the public's understanding of the judicial process by explaining legal jargon and de-mystifying courtroom

proceedings. Because judges are involved in both the theoretical and practical applications of the law, they are in fact the most qualified to play the role of public educators. *See* Robert F. Copple, *From the Cloister to the Street: Judicial Ethics and Public Expression*, 64 DENV. U.L. REV. 549, 578 (1988); Erwin Chemerinsky, *Is It the Siren's Call? Judges and Free Speech While Cases Are Pending*, 28 LOY. L.A. L. REV. 831, 845 (1995). It has even been argued that such commentary by judges is not only desired, but required, in order to fulfill their obligation to maintain public confidence in the judicial system:

> With the overcrowding and underfunding of the court system, the public's perception of the judiciary's ability to dispense quality justice will only decline unless the public understands some details of the constraints under which judges must adjudicate. If judges are to fulfill their duty to maintain public confidence in the legal system, judges must take the forefront in actions to educate the alienated.

Mark Scott Bagukla and Judge Robert C. Coates, *Trustees of the Justice System: Quasi-judicial Activity and the Failure of the 1990 ABA Model Code of Judicial Conduct*, 31 SAN DIEGO L. REV. 617, 637 (1994).

In applying the second prong of *Pickering* to the facts of this case, it becomes clear that the government cannot sustain its burden of demonstrating its interest outweighs Petitioner's speech rights. It is conceded that behind Canons

2 and 3 of the Code of Judicial Conduct lie interests of the greatest importance to the judicial process -- fairness to those who come before the courts, and propriety (both in reality and appearance) of that branch of government which must, above all, sustain citizen trust and confidence. Judges are clearly different from most other persons, even among those who hold public office, in the degree to which they may speak publicly. For example, an obvious and substantial government interest is served by prohibiting a judge from commenting publicly on the merits of a case pending in his or her court, or likely to come before the court. Were such comments allowed, they could certainly erode the public's confidence that, prior to hearing the facts of a case in court, judges are neutral as to the merits of the case.

Yet, the extrajudicial speech in which Petitioner had engaged, and was barred from continuing, was not shown to have jeopardized either fairness or propriety. While a New Jersey judge's televised comments about a case pending in California might hypothetically pose concerns about these interests, the risk is in fact negligible, and this case offers no proof of any risk to either fairness or propriety. Indeed, the permission that Petitioner earlier received for his televised appearances suggests the complete absence of any evidence of a threat to the government's interests.

Certainly, a state may seek to restrain certain types of judicial comment -- for example, with regard to matters pending in that state's courts. Yet, any such restraints must be strictly scrutinized to determine if in fact they serve a

substantial government interest, such as avoiding the risk or even the appearance of impropriety or unfairness. Merely asserting a need to restrain speech, *ipse dixit*, does not under the First Amendment justify the restraint of speech.

C. The rationale for a middle-tier level of scrutiny for government limitations of speech by attorneys is inapplicable to regulations effecting a judge's extrajudicial comments.

Although judges are government employees, the New Jersey Supreme Court without any explanation chose not to apply the *Pickering* test. Rather, the state court looked to this Court's decision in *Gentile v. Nevada*, 501 U.S. 1030 (1991), for guidance and concluded that a "middle-tier" level of scrutiny was all that was required to assess regulations limiting a judge's extrajudicial speech. *In Re: The Inquiry of Evan W. Broadbelt, J.M.C.*, 146 N.J. at 519-20, 683 A.2d at 552 (Petitioner's Appendix p. 28a-31a). *Gentile* was deemed by the New Jersey court to have dealt with a "similar issue" because it involved the regulation of an attorney's speech. *Id.* In *Gentile*, this Court held that the need to ensure fairness in a criminal trial was so great it justified a lower level of scrutiny of regulations affecting a participating attorney's comments about a case. *Gentile*, 501 U.S. at 1074-1076. The more stringent scrutiny of prior restraints of speech articulated in *Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976) was therefore not deemed necessary. *Id.* at 1074.

A careful reading of *Gentile* demonstrates, however, that it involved issues substantially different from those presented in the instant case. In *Gentile*, this Court was explicit in stating that the decision contemplates only "the speech of *those participating before the courts*," *Gentile*, 501 U.S. at 1072 and expressed no opinion "on the constitutionality of a rule regulating the statements of a lawyer who is not participating in the pending case about which the statements are made." *Gentile*, 501 U.S. at 1072 n.5. Petitioner's comments never concerned a case pending before him or any other judge in New Jersey. There is no claim that Petitioner's comments in any way threatened the fairness of any litigation pending in New Jersey. The concerns in *Gentile* are simply not present in this case. Neither is the basis for not requiring the strict scrutiny standard of *Nebraska Press* for regulations affecting the extrajudicial speech of judges. If there are other concerns that would warrant application of a *Gentile*-type standard to regulations of judicial speech, they are not to be found in *Gentile* and this Court should grant review of this matter in order to articulate what are those concerns, if any.

II. THE POLICY ON WHICH THE CHALLENGED ORDER RESTS CREATES VIRTUALLY UNFETTERED DISCRETION IN THE REGULATION OF SPEECH.

This Court's decisions make unmistakably clear why unfettered discretion may not be applied to the regulation of expression. *E.g., Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992). The concern over unfettered discretion in *Forsyth County* and other cases is that, with no guidelines to direct the licensing authority, content-based discrimination may go unchecked. While the discretion this Court has struck down usually involves administrative authority, the exercise of comparable power within the judiciary must be governed by similarly stringent standards.

The existence of such discretion is unmistakable in this case. Indeed, the Supreme Court of New Jersey recognized the breadth of discretion and the lack of guidance provided by the Code when it stated:

> Because our experience is now evolving, we need not attempt to prescribe precise limits for judicial appearances on television programs. We note only that exceptional caution and discretion are essential. We anticipate that the Advisory Committee on Extrajudicial Activities will perform a vital role in formulating standards to govern all such appearances in the future.

In Re: The Inquiry of Evan W. Broadbelt, J.M.C., 146 N.J. at 515-516, 683 A.2d at 550 (Petitioner's Appendix at p.

23a).

If this level of discretion had been given to a licensing authority charged with the granting or denial of parade permits, as in the *Forsyth County* case, there would not be the slightest doubt about the invalidity of the delegation. The standards to guide the exercise of that discretion here are no clearer and, as the following section makes clear, allow for the discrimination against a particular medium of communication. This case thus involves a clear departure from this Court's consistent judgments on the issue of discretion, and for that reason deserves review on the merits.

III. REFUSAL TO PERMIT A JUDGE TO APPEAR ON COMMERCIAL TELEVISION UNCONSTITUTIONALLY DISCRIMINATES AGAINST A PROTECTED MEDIUM OF COMMUNICATION.

The Code provision on which this action rested, in part, commands that "a judge should not lend the prestige of office to advance the private interests of others." *Code of Judicial Conduct*, Canon 2B (Petitioner's Appendix p. 58a-59a). Such a prohibition seems unexceptionable in regard to, for example, judicial endorsement of a commercial product or service. It would presumably be inappropriate for a judge to endorse publicly a particular medium or channel, either print or broadcast. It might also be improper for a judge to appear as a guest on a program the sponsors of which were

involved in litigation before his or her court.

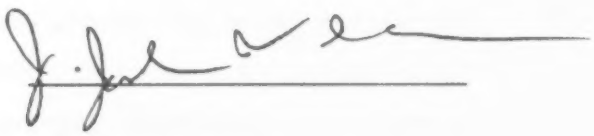
The current situation is, however, a far cry from the type of endorsement to which the code is addressed. Instead, in this case a judge has been told he may not appear on a particular medium, in part because that medium receives sponsorship from commercial sources and, therefore, such an appearance would arguably "advance the private interests of others." That finding carries two deeply troubling implications. On one hand, it strongly suggests that, if the same request came from an otherwise identical program on public television, it would be granted since such an appearance would clearly not "advance commercial television." If that is a correct inference, then the problem seems to be with the medium rather than the message -- a conclusion at variance with the balance of the ruling.

The other inference is even more troubling. The suggestion is that commercial broadcasting may be denied access to substantial expertise of great interest to its viewers and listeners solely because it seeks to make a profit. That is a notion this Court put to rest nearly a half century ago in *Joseph Burstyn, Inc., v. Wilson*, 343 U.S. 495 (1952) when this Court stated "[t]hat books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment." 343 U.S. at 501. Ever since, this Court has recognized that the First Amendment extends quite as fully to those media which seek to make a profit as to those which operate on a non-profit basis.

The decision below, for the first time in many years, resurrects a distinction that may once have had some vitality (*see Mutual Film Corp. v. Industrial Comm'n of Ohio*, 236 U.S. 230 (1915)), but has been so thoroughly discredited that it hardly needs refutation. While there might be times and circumstances when commercial sponsorship would compromise a judge's appearance -- for example, commercials promoting a particular court reporting service or a named bail bondsman -- there is no suggestion here that any such concern entered the judgment. Rather, the New Jersey courts have said, in effect, that whenever a judge appears on a commercially sponsored program of any sort, the integrity of the bench is compromised because "the prestige of office" has been used "to advance the private interests of others." That is a dangerously sweeping inference, and one that does not square with this Court's long-standing view of the mass media.

CONCLUSION

For the foregoing reasons, amicus curiae respectfully urges the Court to grant certiorari in this case, in order to reach the merits of an issue of utmost importance.



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Brief of
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I am employed in the City of Charlottesville, State of Virginia, and am admitted to practice before the Supreme Court of the United States. I am over the age of 18 and not a party to the within action; my business address is 400 Peter Jefferson Place, Charlottesville, Virginia 22911-8691.

On February 18, 1997, I had three copies of the foregoing document(s) served described as brief of Amici Curiae served on the interested parties in this action by placing said copies in sealed envelopes addressed as follows:

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